

1992

The politics of antitrust and its final state : dual enforcement and its status in Pennsylvania

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TITLE:

**The Politics of Antitrust
and Its Final State Dual
Enforcement and Its
Status in Pennsylvania**

DATE: May 31, 1992

THE POLITICS OF ANTITRUST AND ITS FINAL STATE
Dual Enforcement And Its Status In Pennsylvania

By

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A Thesis

Presented to the Graduate School

in Candidacy for the Degree of

Master of Arts

in

Government

Lehigh University

May, 1992

This thesis is accepted and approved in partial fulfillment of the requirements for the degree of Master of Arts.

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ACKNOWLEDGMENTS

The process of creating a thesis or any written work depends upon the help and guidance of a great number of people. This is especially true when one is crafting his very first substantial scholarly work. My appreciation begins in Harrisburg, with the all my former colleagues at Pennsylvania's Office of Attorney General. Working with each member of the Antitrust Section stimulated within me great interest in antitrust law. Special thanks go to David Weyl and James Donahue, who enhanced that interest with a multitude of formal and informal discussions on the issue. At Lehigh University, sincere appreciation goes to Dr. Frank T. Colon, Dr. Howard R. Whitcomb and Professor Linda E. Mosakowski, who assisted me in developing my ideas as well as improving the manner in which I presented them. Their guidance was crucial in this, my maiden voyage into the realm of writing. Thanks also go to Dorothy H. Windish, my liaison with the Government Department and my committee. I would also like to express my deep appreciation to my brother Mark, who was so valuable in helping me produce the text of this thesis, especially during the final hours before its submission. Finally, I would like to express my love to Marliese, who has waited so patiently for the conclusion of my work. Mar, I will be home soon.

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PREFACE

The 1980s represented a decade when the federal government became inactive in the enforcement of antitrust laws, forcing the states to assume a more active role in policing anticompetitive violations within economic markets. President Ronald Reagan's ideology of deregulation and decentralization, contended that in an age of global competition reduced government regulations assisted the nation's free enterprise system. It was believed that if any government intervention should exist, state and other local governments were the preferable regulatory institutions. Yet, this political ideology assumes that state governments already possess the laws needed to protect their individual polities. If necessary laws do not exist within a polity, its members and institutions could easily fall prey to arbitrary and flagrant abuse, especially with limited federal protection.

The Commonwealth of Pennsylvania, which lacks its own state antitrust laws represents a case in point. Its government has been limited in its ability to protect the state's economic markets from restraints of trade and commerce. Markets within the state certainly became endangered in the wake of receding federal protection. Therefore, why has the Commonwealth found it unnecessary to enact a state antitrust law given the reduced role of the federal government in antitrust enforcement ? The remaining forty-nine states all have some form of antitrust law that provides their attorneys general with investigative subpoena power and the ability to file cases in state court. Why has Pennsylvania found it unnecessary to have such powers ? Has

existing federal enforcement been sufficient ? Does the absence of state antitrust represent a huge oversight on the part of the Pennsylvania legislature or does it represent an attempt by legislators to protect the business community in lieu of consumers ? Answers to these questions must be sought within the specific Pennsylvania political debate that has determined the lack of comprehensive antitrust laws. Prior to the Pennsylvania case study, it is necessary to acquire greater understanding of the general debate that surrounds the enactment and enforcement of antitrust laws.

The first two chapters of this thesis will provide the reader with an examination of the evolution of antitrust laws and the political debate that continue to surround their development. By examining the writings of legal scholars, economists and government officials, the study will expose the arguments for and against the active utilization of the laws. The arguments have remained consistent throughout the history of this debate, therefore understanding them will be vital in understanding the specific case of Pennsylvania.

The third chapter of the thesis will examine the existence of state antitrust laws and their practicality in the presence of a national interstate economy. A determination will be made as to the applicability of state antitrust laws as well as the preemption of state law by federal law pursuant to the Supremacy and Commerce Clauses of the United States Constitution. Such an examination is important in order to discern whether arguments for state enactment of antitrust remains a worthwhile pursuit of the Commonwealth's legislature and whether a

state law can actually protect economic markets.

The fourth chapter of the thesis will analyze attempts to enact antitrust legislation in the Commonwealth of Pennsylvania, in light of the general material presented in the first chapters. Political and legal arguments of the Pennsylvania debate will be displayed through available legislative records of the House and Senate, newspaper articles tracking the debate, and law journal articles examining legislative efforts to enact a law. This part of the thesis will give readers insight into the most recent efforts to bring antitrust law to the Commonwealth and to show why past attempts have failed.

The examination of the antitrust debate in Pennsylvania can be thought of as the case study, one that will exhibit the various aspects of a larger political debate concerning the antitrust issue. Since the purpose of this thesis is to examine the politics of antitrust in Pennsylvania, research into the legislative histories was parsimonious. The following report therefore does not represent a history of the debate. Instead I have extracted evidence which I feel best reveals the politics that dominate the Commonwealth's legislative process. These extractions will reveal arguments which are grounded in the competing antitrust philosophies, as well as the development of the nation's system of dual protection against restraints of commerce.

A conclusion will summarize the paper's findings, by highlighting the political motivations believed to allow for adoption or refusal of antitrust laws generally and in the specific case of Pennsylvania. This section will reveal threads commonly found in the antitrust debate. In the end, the thesis hopes to

leave readers with a better understanding of antitrust laws and the development of the dual system of enforcement.

More importantly, it intends to show how the antitrust issue is influenced and manipulated by the participant of political discourse in their attempt to achieve their perceptions of common good. Whether that common good is beneficial to the polity as a whole or the participants per se, ultimately is left to the reader.

Portions of this thesis will include my own observations of Pennsylvania's 1989/90 consideration of antitrust enactment. At the time, I was a Legal Assistant with the Pennsylvania Office of Attorney General's Antitrust Section, a position that provided me with a unique venue from which to witness some of the formative events in the political debate. I attended the two legislative hearings on House Bill 2376 and Senate Bill 1470, exposing me to the testimony of the proponents and opponents of antitrust. I was also involved in the process by providing legal research support for the Attorney General's presentation and construction of the supported measure.

As Eleanor Fox has noted that anyone somehow involved in this issue is likely to have a bias one way or the other. My association with the Commonwealth's primary proponent of antitrust enactment provides an indication of my own perspective on the issue. Through formal and informal discussions with antitrust attorneys, with whom I worked, I developed a pro-antitrust viewpoint. This perspective undoubtedly will show through during portions of the following discussion. Yet, as a student of political science, I have attempted to balance my perspective with the inclusion of views that are opposed to enactment. In the end,

I believe the thesis strikes a balance between competing views on the issue.

Striving towards this balance is my attempt not to be an advocate, but rather a witness to the political debate.

ABSTRACT

The 1980s represented a decade when the federal government became inactive in the enforcement of antitrust laws, thus forcing the states to assume more responsibility in policing economic markets for anticompetitive violations. President Ronald Reagan's ideology of deregulation and decentralization, contended that in an age of global competition, reduced government interference in the affairs of businesses would enhance the nation's free enterprise system. It was believed that if any regulation should take place, state government provided the preferable regulatory agencies. Yet, this political ideology assumes that state government already had the legal means of protecting the well-being of its polity. Pennsylvania, which lacks its own comprehensive antitrust law represents a case in point.

The purpose of this thesis was to examine the general debate concerning the enactment and enforcement of antitrust laws to establish the dominating interests and their philosophies. An analysis of the specific case Pennsylvania case study followed, in order to understand why it remains to be the only state in the United States not to have such laws. This study is especially important given the decline in federal antitrust protection.

The findings of the thesis show that the politics of antitrust is not controlled by partisan party beliefs, rather by the self-interest of the participants of the debate. Voters are not involved in the antitrust debate, because they do not comprehend how antitrust law impact their lives. Consequently, legislators are able to determine their position on the issue according to their own political proclivities. Often this determination is influenced by organized lobbyists who

seek to attain their own interests through the enactment or defeat of antitrust measures. The legislative situation in Pennsylvania is prime example of how the competing interests have kept antitrust in stasis. Senators feel that they need to protect the business in order to maintain benefits to the state derived from employment and tax revenues provided by business. This conciliatory trend towards business has inhibited antitrust enactment. In the final analysis, the debate over antitrust's role in upholding the public welfare is determined by the nonpartisan notion of self-interest.

"The antitrust laws rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions."

Justice Hugo L. Black, writing for the majority in
Northern Pacific Railway v. United States
356 U.S. 1, 4 (1958).

"Law is the Science of Human Conduct
Derived from the Past
Regard for the Public Welfare is
the Highest Law".

Engraved in the upper wall of the entrance to
the Pennsylvania State Law Library
Forum Building, Harrisburg, Pennsylvania.

INTRODUCTION

On March 19, 1991, the Pennsylvania General Assembly passed House Bill (HB) 191 by a vote of 191 to 8, after only 48 days of political debate. The overwhelming support and rapid consideration the bill received signaled the House's willingness to enact the state's first comprehensive antitrust law. This political fluidity was initially matched by the proceedings of the Pennsylvania Senate, which had been debating enactment of its own form of antitrust legislation. Senate Bill (SB) 347 was given active consideration before the Senate Judiciary Committee during the first six months of 1991. The high level of attention these bills received seemed to provide a good indication that bicameral approval of an antitrust law was imminent. Yet, such optimism was abruptly dashed as both measures became stuck in the Pennsylvania legislative process by June of 1991. Neither bill has since seen the light of a committee hearing room or the ornate decorum of the House and Senate chambers. The once vigorous progression of antitrust within the Commonwealth's legislative body had ended, even though one wing of the capital had signed off on the legislation.

Following its approval, the House reported its bill to the Senate Judiciary Committee on April 19, 1991, for consideration. The bill has received no attention by Senators. Coincidentally, the Senate bill, which had been vigorously debated in committee during the spring, also was not accorded any further contemplation by Senators after June. Ordinarily, this form of neglect is not uncommon in the American system of crafting and enacting laws. Bills live and die according to the dominant proclivities that exist within legislative bodies at

particular times. It is quite possible that the Senate's sudden apathy toward the issue was attributable to the presence of other issues that were seen as politically more important. The state's budget negotiations, which draw a heightened level of activity during the month of June might account for the sudden lack of attention toward antitrust. Another reason might have been the presence of irreconcilable and divergent interpretation over how the language of the bills should read, or what businesses should be exempt from the purview of antitrust enforcers. Failure by antitrust proponents to cultivate and maintain enough political support among Senators may also have caused a decline in the ability to sustain the issue's viability. Whatever the reasons may have been for antitrust's current inactivity, the above suppositions can only point to possible explanations. More specific reasons must be sought within the Pennsylvania debate.

The efforts of the 1991/92 legislature have not been unique, since the current House and Senate bills together represent at least the sixth time in the last seventeen years that the enactment of antitrust has been attempted. Failure of past attempts has not come as the result of a final vote rejecting a particular measure, but rather by the inaction of legislators to allow measures to move through the process leading to a final vote. Something within the Pennsylvania debate over antitrust has been consistently able to forestall the full enactment (or rejection) process. Determining what political forces have been able to do this will be part of this paper's purpose. These forces are currently working to continue the current inactivity of legislators. If it is allowed to continue, by the end of the current session, Pennsylvania will remain the only state in the United

States not to enjoy its own state antitrust act. 1. That fact alone is cause for an investigation.

Antitrust laws generally have been intended to protect economic markets from restraints placed upon competition by private businesses that can ultimately result in higher consumer prices and harmful trends within a polity's economy. Since such dysfunctional competitive situations can evolve in any type of capitalistic market, antitrust laws have been constructed with broad language which provide governments with the ability to monitor and regulate any anticompetitive activity, wherever it may arise. Richard Hofstadter, in discussing the broad language of the federal Sherman Act, observed that, "Congress was attempting to lay down a general declaration of policy that would serve as a guide for future action in much the same flexible way as the Constitution itself had served the country after 1787". 2. The consequent breadth of antitrust's influence extends into many diverse areas today that the founders of the first state and federal laws could not imagine. These include, but are not limited to, cable television, mobile home sales, the energy industry, dentistry, the production of automobiles and college tuition. Antitrust laws have the ability to impact any part of society that somehow involves declining competition within an economic market. 3.

1. The District of Columbia, Guam and Puerto Rico each have their own antitrust laws

2. Hofstadter, Richard, "What Happened to the Antitrust Movement", See Sullivan, E. Thomas, The Political Economy Of The Sherman Act, New York, Oxford Press, (1991) page 23.

3. Several limitations on the use of state and federal antitrust laws do exist, as determined by either legislative mandate or court ruling, e.g. the McCarran-Ferguson Act exempts the insurance industry from federal antitrust laws.

Since generalities are often included with written language of antitrust legislation, the resulting laws frequently allow the executive and judicial branches of government wide latitude in executing and interpreting the appropriate application of the law. "American antitrust law is not only 'law' but also a sociopolitical statement about our society and what role, if any, government should play as a market regulator." 4.

Any time government has this ability to create interpretative policies, political forces and ideas actively mobilize themselves in order to influence the process that creates those policies. These forces seek to influence members of the different branches of government through political lobbying, as well as through normative legal writings. This is especially true of the debate that revolves around the establishment and enforcement of laws that have impact on the most vital aspect of a modern, capitalist-based polity, the maintenance of its economy.

It may be said that in the final analysis, that the position of government officials towards antitrust, depend largely upon how they define the capitalistic term "free market". Defining this term will often depend upon what constituencies those participating in the antitrust debate identify as their own. In the United States, the economic constituencies are often consumers and producers, each of whom have personal interests in maximizing their own benefits from capitalism. Based upon these interests, each constituency will define the free market differently.

4. Sullivan, E. Thomas, The Political Economy Of The Sherman Act., New York, Oxford Press, (1991) page 3.

Consumers define free markets as existing only when a diversity of producers within a particular market. Each producer competes against another producer in a process that provides for the creation of quality goods and services sold at low prices. This interpretation aligns itself with the "market-structure" advocates, who aver that markets must maintain a multitude of small competing firms in order to allow a healthy economy to exist. Without diversity, participation in markets will decline and abuse will be more apt to occur. Consequently, whenever a lessening of competition develops, market structure advocates believe that government must broadly interpret antitrust laws in order to regulate the affected market. A free market can only exist when it is free of the business community's ability to regulate and control markets.

The alternative view, held by the producers and advocates of the "efficiency" school of thought, aver that antitrust laws should be narrowly interpreted, to provide businesses with the freedom to carry out their economic policies. Only in this way can a business' vitality be achieved. The efficiency school stresses that a productive and competitive economy can only exist when government regulation is minimized if not eliminated. The free market, therefore, can only exist when it is free of government interference and the natural forces of capitalism are allowed to progress.

The ultimate goal of each these schools of thought is the creation and maintenance of competitive and efficient markets that can benefit the polity. The schools differ only in terms of the practical means by which they seek the attainment of that goal. Understanding each of their interpretations as to how antitrust should be utilized in fulfilling that endeavor is the fulcrum of knowing

the antitrust debate. Since neither school of thought holds the status as being exclusively correct, but both have attributes that are desirable, a balance tends to develop over time through the debate of ideas.

Government, which constantly seeks to execute its fiduciary responsibilities of creating laws and rules that best serve the common good, finds itself in the middle of this exchange of ideas. Since a polity's economy is benefitted the most when the symbiotic relationship between consumers and producers is maintained, government strives to achieve comity between the rival sets of ideas. Antitrust legislation and policies pursued by government, over time, actually place these differing ideas and their constituencies in a balance. The balancing debate over antitrust laws is thus not unlike the debate that continues to exist over their broadly-worded "parent" document, the United States Constitution. Both sets of legal constructs have experienced cyclical change regarding their interpretations, especially with regard to freedom and governmental intervention. Determining whether such a balancing effect has taken place in the Commonwealth of Pennsylvania, given its lack of antitrust laws, will be discussed in Chapter Four.

Among those who contribute the most to the debate concerning the interpretations of antitrust laws, are the members of the academic and legal community. Individuals representing these groups confront one another through their writings that advocate one of the two schools of thought. Market-structure scholars, such as Eleanor Fox and Lawrence Sullivan, together with efficiency scholars such as Robert Bork, Frank Easterbrook and Dominick Armentano, maintain what Andrew Gavil, Professor of Law at New York University, called

"the bi-polar debate". 5. The competition of ideas between these scholars is influential upon those who have an active role in creating antitrust legislation and defining its eventual policies. Members of government, as well as interest groups, adopt and advocate one or the other of these two philosophies, according to the interests or constituency that they represent.

"Like democracy, (antitrust) encompasses the tension between pluralism and efficiency, power and powerlessness, freedom and fairness...it implicates questions of process and questions of policy." 6. Development of state and federal antitrust laws, like the development of all law, depends upon the competition of political ideas and economic philosophies, and ultimately which one serves the goals of a particular polity at a particular time. Competition also creates a balance between the two dominating political-economic interpretations within the antitrust debate. Since the purpose of this thesis paper is to discover the possible reasons why state antitrust legislation has thus far failed to take root in Pennsylvania, it will be vital for readers to have a greater understanding of the general arguments utilized by the different schools of thought. The purpose of these introductory remarks is only to provide a cursory exhibition of the two arguments made in the antitrust debate. Further reading of the paper will provide a more in-depth study of the evolution of antitrust law and a more enhanced look at the two schools of antitrust thought. All of which will be a prologue to the continuation of the debate in Pennsylvania.

5. Gavil, Andrew, "Teaching Antitrust Law in its Second Century: In Search of the Ultimate Antitrust Casebook", 66 N.Y.U.L.Rev.217 (1991).

6. Fox, Eleanor M., "Teaching and Learning Antitrust-Politics, Politics, Casebooks, and Teachers", 66 N.Y.U.L.Rev.225,226 (1991).

By evaluating the most recent attempts at enacting antitrust in the Commonwealth, dating back to 1975, together with existing political-economic trends within Pennsylvania during that time, the politics of antitrust can be weighed in light of the state's economic realities. Emphasis has been placed upon the most recent efforts, due to existence of limited legislative histories as well as for parsimonious concerns. The paper should not be devalued by this limitation, since arguments for and against antitrust remain quite consistent.

Notwithstanding the paper's limitations, a more lucid picture of Pennsylvania's aversion to state antitrust enactment will emerge. 7.

7. I have selected 1975 as a benchmark to commence my study of the Pennsylvania case study, for it represents a time of heightened enactment of state antitrust law. Also in the following year, the United States Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which extended to state attorneys general the ability to seek antitrust relief for its citizens, under federal law. Since 1976, several states enacted or improved antitrust laws.

CHAPTER ONE

TRUSTS AND ANTITRUST: DEVELOPMENT OF COMPETING INTERESTS

Crisis, either real or perceived, provides the impetus for the creation of law. Whether economical, financial, political or social in nature, the ability of crises to affect a polity ultimately is determined by the kind of political-economic structures the citizens of that polity recognize as being sovereign over their existence. Citizens of the United States recognize their sovereign system as one that mixes capitalistic and democratic ideologies into a compatible amalgam. The combination of political and economic ideals fusing together creates within individuals an association that links personal liberties to those concepts relating to the nation's system of free economic markets. When encroachments were made against the market system a century ago, personal, political liberties were also thought to be endangered. Representatives at various levels of government, who were bestowed with the responsibility guarding the well-being of the polity, were apt to enact laws that sought to ameliorate those activities doing harm to the market. Enactment of such laws served a dual purpose; for not only did they regulate markets directly, but they also impacted the political liberty of citizens.

When the national government of the Articles of Confederation faced hostilities in Massachusetts over high taxes in 1786, its membership was prompted to revise the Articles in order to afford greater regulation over crises like Shays Rebellion that endangered the economic well-being of the polity. The resulting, "...Constitutional Convention was concerned with the creation of a government that could not only regulate commerce and pay its debts but also prevent

currency inflation...and check such uprisings as the 'Shays Rebellion'". 1. This dramatic and revolutionary action was taken not only to guard personal liberties, but to protect the integrity and efficiency of the nation's free market economy.

During the Great Depression of the 1930's, the national government lacked the means to counteract the serious and devastating economic and social problems that plagued the United States. President Franklin D. Roosevelt, together with the Congress, responded by developing "New Deal" legislation that established such programs as the Civilian Conservation Corps, the Public Works Administration and the National Industrial Recovery Act, all of which provided government better means in assisting the unemployed and the stagnant industrial community. Again, the same traditional goals of personal and economic liberty motivated these actions. Thirty years later in the 1960's, after a decade of extensive struggle, Afro-Americans were finally granted the same rights that their fellow white citizens enjoyed, through the Civil Rights Acts of 1964 and 1965. This final political crisis was contemplated and debated only after members of the Executive and Legislature became aware that the movement impacted the larger American polity. A reaction to a crisis, whether political or economic, occurs only when it becomes evident to the political powers that control a polity's agenda.

Not unlike these examples of crisis and the establishment of corrective law, the creation of American antitrust laws evolved solely as a response to the rapid industrial revolution that erupted throughout the country after the American Civil War. During the late nineteenth century, "...the American economy entered

1. Hofstadter, Richard, The American Political Tradition, New York, Vintage Books, (1973) page 6.

a period of unparalleled growth attributable to several distinct factors: the emergence of national markets for manufactured products, the innovation of new technologies capable of manufacturing goods in large quantities and the generation of vast amounts of capital necessary to finance this growth". 2.

The industrial revolution overtook the American people without any prior contemplation and/or planning. Business activities that took place during this time exemplified personal liberties being exercised in free markets. Individuals freely utilized new and revolutionary technologies to better produce and distribute new products and services. The goal of developing industrial firm was to capture a dominant position within a specific market before anyone else could. Initial financial investment was thought to be easily reclaimed with seemingly unlimited ability to sell whatever good the firm produced. Yet, as more and more participants began to enter economic markets, competition increased dramatically and firms were hampered in attaining sales high enough to gain a profit. As competition increased for such things as raw materials, distribution carriers and their transportation networks, and the all-important consumer, cost increased. With more firms competing for the same things, early entrepreneurs began to suffer a relative decline in their investment-profit ratio. This decline prompted firms to produce more goods in order to recapture profits. Eventually this trend produced overproduction of goods as firms produced more goods, in amounts far beyond the American people's ability to

2. Fox, Eleanor and Sullivan, Lawrence, "Retrospective and Prospective: Where Are We Coming From? Where Are We Going?", See Revitalizing Antitrust In Its Second Century, Edited by Harry First, Eleanor Fox, and Robert Pitofsky, New York, Quorum Books, (1991)page 3.

consume.

The development of overproduction provided an ideal opportunity for consumers who were able to choose from a diversity of goods and services, while obtaining those goods and services at low prices. If a particular firm's price disagreed with consumers, they could simply take their "business" elsewhere. Competition thus became something that Americans desired, since it both complemented and reflected the political liberties that were considered so sacred by the nation's traditional democratic ideology. Competition between business firms was also viewed as stimulating greater economic development and efficiency, since firms had an existential incentive to create better quality and innovative goods to attract consumers. So long as the pluralism of the free market existed, efficiency and the nation's economic well-being were thought to be assured.

The benefits of natural competition and industrial pluralism were not shared by all members of the American polity, especially for those original market participants who were no longer capable of reaping huge profits. "By the late 1870's and early 1880's entrepreneurs were seeking ways to obtain relief from unrelenting competition...Agreements to lessen price competition and to coordinate output became a common solution." 3. Only by regulating markets through agreements between competitors could business firms hope to retrieve profits and thereby remain in existence. Eleanor Fox and Lawrence Sullivan point out that, "(t)he first form, pioneered by the railroads and later adopted by

3. Ibid, page 4.

other industries was the prototypical pool". 4. Participants in the pool, or what today we would call cartels, were managed either by a lead firm or certain designated individuals working within the pool. The managers established the quantity of goods or services a firm would make available to consumers and the related price. The purpose of the arrangement was to afford firms within a market a mechanism to avoid the economic attrition that occurred when competition was allowed to freely exist. Managed competition ensured that all members would attain equitable wealth transfers from consumers, thus eliminating the desire to carry on operations outside the pool. Although this management arrangement seemed to have the potential to extensively reduce competition, the limitless number of virgin markets, provided too many incentives for member firms to abide by the rules of the pool. New areas for economic development were also not covered by established agreements, thus allowing firms to break with the pool. Some firms still felt it was more advantageous to remain competitively active.

"Perceiving the need to ensure full cooperation, some industrialists began to seek ways to centralize market control with restrictions that would bind all participants...The most attractive design hit upon was the trust." 5. The trust was an agreement entered into by competing firms to form a pool-type structure with agreements consummated by an exchange of common stock of the member firms. Each firm thus held stock in companies they previously competed against. With the trust, all members retained common interest in the enterprise, since__

4. Ibid.

5. Ibid.

all benefitted from each others' stock. A corporate communalism was formed to protect profits that would normally be endangered by competition. The losers in such arrangement became the independent consumers, who lacked knowledge of trust agreements and continued to buy goods unconscious of artificial price increases. The drop in supply and increases in prices of goods and services were thought to be attributes of economic cycles. Yet, when prices continued to remain high, awareness of price fixing and market-tampering were thought to be possible causes.

"A depressed agricultural sector-still (by) 1890, a major part of the American economy-was casting about for sources of its economic troubles". 6. Given the fact that farmers relied upon the railroads exclusively to transport their grains and produce to market, any kind of price increase, natural or artificial, had great impact upon both state and national economies. The pooling arrangements reduced competition among railway carriers and increased the price of rail service for farmers. Higher costs for farmers meant higher prices for those buying agricultural products, which in turn meant less consumption. Normally in such a situation, prices would drop to compensate less demand. Yet, the rail trust refused to lower prices, an action that had a predictable influence through the rest of the economic continuum. A result of this trust activity was thought to have forced state economies into recession. Consequently, as both George Stigler and William Shughart note, "...monopolies especially the railroads... were popular targets of complaint". 7. Thorelli adds, "(o)pposition

6. Stigler, George, "The Origin of the Sherman Act", The Political Economy Of The Sherman Act, E. Thomas Sullivan, New York, Oxford University Press, (1991) page 32.

to the malpractices of transportation agencies and other...monopolies was always a significant part of the anti-monopoly movement in post-bellum years; in fact, until 1880, the outcry against the railroads constituted the core of the (agrarian or "Granger") movement." 8. The economic problems that farmers were enduring were directly attributed to the private manipulation of competition in commerce.

The importance that the states had placed upon agriculture, was exemplified by the protective laws that were established to alleviate the perceived crisis. Granger laws were first established to control the railroads and were quickly followed by state antitrust laws. The support that these laws gained in state legislatures related directly to the fact that a crisis existed in a segment of the economy that mattered greatly to the well-being of each state. The thought of monopolies having control over the economic destiny of the states caused great concern and even a revitalized awareness of the important association between economic and political freedoms. This attitude created fertile ground for antitrust enactment.

Not knowing, let alone understanding the dramatic changes that were brought about by the industrial revolution, legislators and the citizens alike became skeptical of the rapidly increasing power of "big business". When the public associated the concentrated power of newly emerging businesses as a possible cause for the recession, passage of antitrust laws at the state level became inevitable in many states.

7. Stigler, Ibid. Also see: Shughart, William, Antitrust Policy And Interest Group Politics, New York, Quorum Books, (1990) page 12.

8. Thorelli as cited in Laws and Economy: The Legal Regulation Of Corporate Capital, by Kelvin Jones, London, Academic Press, (1982) page 163.

Anti-monopoly laws developed rapidly. Prior to 1890, a total of seventeen states had enacted state antitrust laws, many of which were found in the agrarian South. Three more states, Kentucky, Louisiana and Mississippi, all passed their antitrust laws in 1890. (See Appendix A) Enforcement of the laws, on the other hand, was more difficult as businesses and industry quickly expanded their operations beyond the intrastate confines and state jurisdiction. A single state law could not impact the commercial practices of a railroad, a manufacturing company or any other form of business participating in any other state. In the tradition of the Supreme Court case, Gibbons v. Ogden (1824) 9., the national government realized its increased responsibility in regulating interstate commerce.

In that case, the State of New York had granted a monopoly to Fulton and Livingston empowering them to provide state licenses to those who wished to operate steamboats in New York waters. A steamboat license was granted to Ogden for a route between New York and New Jersey. Gibbons acquired a license to traverse the same route, only his license was obtained through the federal government pursuant to a congressional statute of 1793. Ogden claimed Gibbons did not have rights to the route, and would injure his livelihood. He sued Gibbons and actually had Gibbon's boat impounded. The Supreme Court's action was critical. A decision in favor of upholding the federal statute would be considered as support for too much centralized power, while a decision in favor of the New York statute could have resulted in the nation breaking apart from state economic

9. Gibbons v. Ogden, 9 Wheaton 1 (1824). Also see, Goldman, Sheldon, Constitutional Law And Supreme Court Decision-Making, Cambridge, Harper & Row, (1982) page 63-67.

fratricide. The course chosen was one of moderation. In the decision, the Court decided in favor of Gibbon and "...affirmed the federal government's right to regulate interstate commerce...which provided the basis for the sweeping exercise of federal power...". 10. The Court did, however guarantee the protection of the states' right to regulate intrastate commerce. When commerce occurred among the several states, federal intervention was constitutionally appropriate.

The economic recession that faced the country, combined with negative public reactions towards concentrated economic power, inculcated the national legislature with the need for a federal antitrust law. The state did not have the ability to affect interstate commerce. Consequently, "(b)oth the Democratic and Republican parties included antitrust platforms in their 1888 election campaigns." 11. The power and popular sentiment that the issue generated was reflected in the bipartisan support that it received among legislators. A form of "radical populism", as discussed by Neal and Goyder, eventually led to the first federal antitrust act, the Sherman Act, which passed in the U.S. House by a vote of 242 to 0 and the Senate by a vote of 52 to 1. 12. The votes took place in election year 1890.

The ultimate goal of Congress was to protect the nation's economy from the powers of the few, by placing in law its desire that the national economy be

10. Armentano, D.T., The Myths Of Antitrust, New Rochelle, New York, Arlington House, (1972) page 52.

11. Fox and Sullivan, *Supra*, page 5.

12. Neale, A.D. and Goyder, D.G., The Antitrust Laws Of The United States Of America, Third Edition, Cambridge, Cambridge University Press, (1980) See Chapter XV.

maintained through a diversity of competing firms. Such intentions were in accord with the American tradition of distrusting excessive, centralized power over personal liberty, whether that be economic or political power. Congress' actions were meant to canonize the idea of competition into the nation's body of law. The national legislature feared that the trusts were developing, "...economic power to exclude individuals from opportunities for material success and ...amass wealth to be used to corrupt the legislative process and affect governmental decisionmaking". 13. The Sherman Act reflected this concern in its broadly constructed language which emphasized that all restraints on commerce were declared illegal.

With the establishment of federal antitrust authority, the need for continued state enactment and enforcement of antitrust was thought to be marginalized given its limitations and the power of the federal government to regulate interstate commerce. Yet, between the time of the Sherman Act's passage in 1890 and 1929, a total of fourteen states enacted their own antitrust laws. The primary reason for continued state enactment was due to the federal government's initial inability to successfully enforce the Sherman Act. In United State v. E.C. Knight Company (1895), the Supreme Court limited the federal government's use of its newly established law. The case involved Justice Department averment that the "...American Sugar Refining Company acquisition of E.C. Knight Company (and three other independent sugar refiners) tended to

13. Sullivan, E.T., The Political Economy Of The Sherman Act, New York, Oxford University Press, (1991) page 14.

create a monopoly in sugar manufacturing...". 14. The justices, though admitting that a "near monopoly" existed, decided to narrowly interpret the law, since the manufacturing in question did not impact interstate commerce. "... (T)he Court held that the law did not, and indeed could not, forbid monopolies in manufacturing, because manufacturing was not a part of interstate commerce and effects interstate commerce only 'indirectly'...." 15. "To allow the national government to regulate this subject would be to permit encroachment on the reserved powers of the states." 16. The Act's broad language was thus trimmed, an action which stimulated a greater sense of state autonomy over the regulation of state commerce. The Court reinforced the state view that intrastate protection remained a viable guard against those local monopolies that continued to operate exclusively within a state's boundary. Ultimately, Knight represented a watershed in the debate over dual antitrust enforcement and whether state antitrust laws were viable and efficient legal tools to protect economic markets.

Congress had expanded federal power over commerce only to have that power checked by the Supreme Court five years later. The Court had recognized the continued viability of state rights. As Robert Bork noted, "(t)he limitations upon Congress' commerce power were thought to be of two sorts-the reach of the power, defined by the interstate-intrastate distinction and the nature of the power, defined by the commercial-noncommercial distinction...limitations...based on concepts of federalism and limited central

14. Armentano, D.T., *Supra*, page 56. Also see United State v. E.C. Knight Company 156 US 1 (1895).

15. McCloskey, Robert G., The American Supreme Court, Chicago, The University of Chicago Press, (1960) page 127.

16. *Ibid*.

government". 17. Ironically, the actions of both the Congress and the Supreme Court were in response to the appearance of greater, centralized power. For the former it was greater power based within industry, while the latter saw too much power in the hands of the national government.

Nine years later in Northern Securities Company v. United States (1904), the Supreme Court resuscitated the Sherman Act, which had been considered by many, including the McKinley administration, to be an inert law after the Knight decision. 18. The Northern case involved a combination of the Northern Pacific and Great Northern Railroads in the United States Northwest, an area that possessed limited competition within that particular industry. Since language of the Sherman Act explicitly recognized all combinations in restraint of trade as illegal, and the combination in question did directly impact interstate commerce, the Court upheld enforcement of Congress' federal antitrust statute. Justice Harlan stated:

"No scheme or device could more certainly come within the words of the Sherman Act...The mere existence of such a combination...constitute(s) a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." 19.

After the Northern decision, the U.S. Justice Department's antitrust division became invigorated and commenced a heightened level of enforcement. 20. The

17. Bork, Robert, "Legislative Intent and the Policy of the Sherman Act", The Political Economy Of The Sherman Act, Edited by E. Thomas Sullivan, New York, Oxford University Press, (1991) page 58-59.

18. Northern Securities Company et al. v. United States, 193 US 197 (1904).

19. Armentano, D.T., The Myths Of Antitrust, New Rochelle, NY, Arlington House, (1972) pages 58-59.

20. Ibid, page 62.

division began to prosecute some of the largest existing monopolies and trusts, including the Standard Oil monopoly. Expanding the role of federal enforcement seemed again to minimize the need for state enforcement.

Yet, notwithstanding the presence of more activist federal antitrust policies, states continued to pass their own laws. The early lesson regarding the limitations of federal antitrust laws made it clear to the states that federal protection would not always be capable of protecting their markets. Uncertain as to when that protection would be unavailable, states wanted to ensure that they would at least be capable of protecting against anticompetitive activities on their own. The Knight decision and the Northern Securities decision, together with the federal government's policy decisions, indicated that inconsistent enforcement policies were a possibility. As the Knight case also pointed out, violations could occur exclusively within intrastate jurisdiction. Consequently, states prepared themselves through statutory enactment for a time when federal enforcement would not have jurisdiction or when enforcement was not deemed appropriate.

The antitrust movement was and remains cyclical, as determined by how the dominant theories of competition gauge relative to the economic situations facing a polity. 21. Therefore, when federal agencies adopt active enforcement policies, the necessity of active state enforcement is diminished. Conversely, with a decline in federal enforcement, states may feel it vital to increase their own policing of anticompetitive activities. Differing interpretations as to how

21. Sullivan, E.T., The Political Economy Of The Sherman Act, New York, Oxford University Press, (1991) page 4.

markets should operate and what qualifies as "competition", is largely determined by how a state weighs the political-economic liberties of individual consumers against those of its corporate citizens.

CHAPTER TWO

THE BI-POLAR POLITICAL-ECONOMIC PHILOSOPHIES

When debating the enactment or enforcement of antitrust laws, participants in the political discourse usually differ from one another in terms of their interpretation of the words that cumulatively make up the antitrust lexicon. Different interpretation of "free market", "competition" and "consumer welfare" stem from the personal economic beliefs and/or the political constituency with which participants in the debate most identify. As previously mentioned, existing antitrust legislation and laws have been constructed with broad language in order to ensure that diverse economic markets can all be protected by the same set of governing statutes. Consequently, the laws are open to a great deal of different interpretations. One only has to remember that, "(a)ntitrust cuts across a polity's economy, applying not to a specific industry but rather to specific business practices used in many industries". 1. A wide variety of interested parties thus becomes engaged in the debate, since the political determination of heightened utilization or disregard of antitrust can influence the activities of both businesses and consumers.

Since the protection of these activities are collectively linked to the health of a polity's economy, the antitrust debate considers each to determine the relative need for greater freedom from "unnatural" competitive situations. 2. A decline in antitrust enforcement may enhance the freedom of businesses to operate as

1. Shughart, William F., Antitrust Policy And Interest-Group Politics, New York, Quorum Books, (1990)page 2.

2. Unnatural competitive situations exist when markets are manipulated by corporations.

they please, while increasing enforcement may reduce private regulation and enhance the freedom of consumers to choose from more goods. Participants involved in this determination, whether for or against antitrust laws, have discovered that their diverse interpretations are deposited in one of two schools of antitrust thought. Together these schools form the spectrum of interpretations generally expressed in the antitrust debate. Thus, in order to understand the politics of antitrust it is first important to understand each of two schools' primary assertions. As Professor Fox has opined, "(i)t is impossible for the student, scholar, practitioner or legislator to be fully involved in the world of antitrust without forming her own set of organizing principles for both a descriptive and a normative concept of antitrust". 3. Although all possible interpretations are not limited to these two competing sets of ideas, given the binary nature of the debate, anything contrary to the strict adherence to one or the other, will actually be some kind of mixture of the two.

The Modern Populist School of thought maintains that antitrust laws should be frequently utilized in order to sustain a multitude of competing firms within a market. The Chicago School, in contrast, believes in minimizing antitrust's use and allowing firms to freely and naturally interact within markets. The difference of opinion between the two schools does not involve the question, "How much government involvement should exist within a polity's economy, in order to maintain the efficiency of that economy?" Both schools believe this is the

3. Fox, Eleanor M., "Teaching And Learning Antitrust-Politics, Politics, Casebooks, And Teachers", 66 New York University Law Review 225,226, (April, 1991).

primary question facing a government. Rather, the differences arise between the school in terms of the means best capable of achieving the desired goal of efficiency. Each school has its own convincing set of arguments; yet, neither retains a monopoly over the proper course that should be pursued in setting those means. The antitrust debate largely deals with what school is best able to influence the legislative or executive decision-making processes that establish antitrust enforcement policies.

The original creation of antitrust laws occurred almost exclusively in an economic vacuum, as lawmakers were not in contact with economic theories. Beyond the generalized capitalistic concepts of supply and demand, economic interpretations of antitrust were provided with little standing throughout the formative debate over state and federal legislation. One reason for this lack of attention certainly was due to the fact that economics had not yet attained the advisory stature it now possesses in legislative bodies. Economics was seen as a social science, examining aspects of human behavior, that could not be measured accurately and that lacked consistency. Empirical measures from which stable conclusions could be drawn were simply unreliable. "For the entire formative period of antitrust law, the lawyers and the more rigorous economists, by and large did not communicate". 4. In addition to uncertainty regarding economics as a science, complex economic ideas were excluded in order to gain political support among the electorate. The intent and language of the laws reflected a "primitive folk" economic vernacular that was easily comprehended by ordinary

4. Robert H. Bork, "Judicial Precedent And The New Economics" (A Conversation), Moderated by Robert B. Shapiro, Antitrust Policy In Transition: The Convergence Of Law And Economics, by Eleanor Fox and James Halverson, Washington, D.C., American Bar Association, (1984) page 6.

voters.

The early antitrust laws consequently lacked any political dialogue that included empirical or theoretical understanding of the potential economic impact the laws might have on the nation. Instead, lawmakers relied upon populist ideas that reflected simple traditional American ideas of pluralism and personal liberty which were readily accepted by the legislature's constituents. The populist theory, which is not unlike the Modern Populist Theory, dominated antitrust interpretation for most of the twentieth century. A corporation's size alone was considered a vice, since "big" represented centralized power, something the American people abhorred. Consequently, populists believed that small independent firms should make up the competitive structure of the nation's economy. In fact, due to the popular nature of antitrust, legislators rarely deviated from this theoretical construct. The only time a legislator might have deviated from support for antitrust was when a political and/or economic interest was seen as more important.

As economics became more reliable academic endeavor, it became a more important decision-making tool of government, especially after the Depression of the 1930's. Scholars began to study existing antitrust cases and statutes, in order to better understand their impact on the U.S. economy. Since previous courts had to rely upon political and quasi-economic theories to guide them, the integrity of the established cases was questioned by some laissez-faire economic scholars. In fact, Chief Justice White provided impetus to these scholars when he expressed his hope that as economics developed into a more scholarly endeavor, it would be better able to guide and inform the law. 5. The importance of

economics began to gain acceptance within the American polity. The seeds of its philosophical vehicle, "Efficiency Theory" were planted by University of Chicago economist Aaron Director, and nurtured by a multitude of reknown scholars, including Milton Friedman, George Stigler, and Robert Bork. The original seeds have developed into today's "Chicago School", which now vigorously competes with the Modern Populist School in the marketplace of antitrust interpretations. Prior to any further examination of the Chicago School, it will be important to first understand its antithesis, the Modern Populist School.

The "Populist" theory, also known as the "Structural Theory", places great emphasis on maintaining a variety of producers within the free market construct. Although expressed differently by various scholars and participants in the antitrust debate, this philosophy will be referred to as the "Populist Theory" in this paper. The scholars who today best personify advocates of this school of thought are Eleanor Fox, Professor of Law at New York University, and Lawrence Sullivan, Professor of Public Law at the University of California at Berkeley. In a jointly written article entitled, "Anchoring Antitrust Economics-A Lexicon", Fox and Sullivan expressed the Populist school's interpretation of antitrust. "Antitrust law, like constitutional law, is something based on a panoply of fundamental values, which include process, access, pluralism and choice. 6. Protection of these core values is thought essential not only for an

5. Bork, *Supra*, page 7. Also see Standard Oil v. United States, 221 US 1 (1911).

6. Fox, Eleanor and Sullivan, Lawrence, "Anchoring Antitrust Economics-A Lexicon", See Revitalizing Antitrust In Its Second Century, Edited by Harry First, Eleanor Fox and Robert Pitofsky, New York, Quorum Books, (1991) page 76.

efficient economy to develop, which would yield benefits to consumers, but also to provide the polity with protection against an accumulation of economic power.

Economic power can eventually be exerted as political influence placed upon government. If enough influence could be accumulated, companies could manipulate the governmental system to their own advantage and to the detriment of the nation's citizens. This fear of too much concentrated power inherently reflects the traditional ideas that originally establish state and federal antitrust laws, as well as the Constitution.

Given the Populist concern for both economic and noneconomic values, the activities of the business community were continuously examined with great skepticism, since it was believed that business judgment could not be trusted to look out for what is best for the collective economy of a particular polity. The inherent self-interest behavior of business firms constantly forces industries to enhance their respective position in the market by increasing their power through either short-term or even long-term profits by limiting their production and distribution costs. If a company is powerful enough, the process of limiting costs may include economic and political means of restraining trade.

Fox and Sullivan accept these aspects of business behavior as inbred in capitalistic practices, since each firm desires to gain a dominant position in a respective market. To do otherwise in a capitalistic system would be irrational. Both professors believe that complete trust in businesses and their activities ignores the fact that firms will take any action that enhances its survival within a market, notwithstanding the potential negative impact upon a market not to mention the overall economy. Thus, it is necessary to maintain a continuous

system of rival firms competing against one another to allow the benefits of competition to continue to flow to consumers. This process actually maintains a balance between benefits earned by producers and those claimed by consumers. Reliance on such a system allows the state or national economy never to depend upon one or a few firms for its economic well being.

When a firm attempts to utilize its economic position to further increase profits beyond what the market naturally yields, and competing firms cannot counteract the monopolizing firm's actions, the Populist School believes government has responsibility to intervene in order to arrest the monopolizing firm's behavior. Antitrust laws, either federal or state, are intended to "...protect the competitive process and shield consumers from unreasonably exclusionary practices that impose costs on competitors and block competitors from supplying consumers with desired products". 7. Restricting output and raising prices for consumers are negative activities for they allow monopolistic firms to control consumption pattern within a polity. Reflecting this view, Robert Lande presents the school's concern for the damage that results from "transfers of wealth" from consumers to producers. When consumers pay greater amounts of money to a dominant firm, it intensifies the firm's control for a market and is detrimental to the entry of new competing firms. Lande states that the purpose of antitrust law "...is to prevent firms from acquiring and using market power to force consumers to pay more for their goods and service...which increases the amount of wealth transferred from the former

7. Ibid.

to the latter". 8. The efficiency of an economy is not the only concern of this school of thought, as the political and social ramifications of certain economic activities are also prioritized. Negative business activities can result in unemployment and recession, not unlike that which occurred during the late 1800's. The Populist School therefore fully accept the words of Louis Kelso, who has said that, "...in a modern industrial world only government can be responsible for the prosperity of an economy". 9. Government must strive to maintain prosperity for all members of a polity and not solely economic prosperity for a polity's industrial firms.

Like the Modern Populist School, the Chicago or "Efficiency" School is also concerned that economies remain efficient by maintaining product output. Yet, in contrast to the Populists, the Chicago School of antitrust, places greater emphasis on economic efficiency and less on the direct political and social impact upon a polity. The Chicago School feels that the efficiency of industrial firms can only be enhanced by the natural process of competition, which if left alone, will eventually produce noneconomic objectives for the polity. Chicagoans are true believers in Smith's notion that "...pursuing one's own (business) interests frequently promotes those of society via an 'invisible hand'". 10. Dominic Armentano, Professor of Economics at the University of Hartford, echoes this vision by saying, "(t)he standard neo-classical economic approach...sees most

8. Lande, Robert H., "Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust", See Antitrust Law Journal, Volume 58, Issue 2, New York, American Bar Association, (Summer, 1989) page 631.

9. Louis Kelso, Interview by Bill Moyers, A World Of Ideas: Part Two, New York, Doubleday, (1990) page 216.

10. Walton, Gary M and Wykoff, Frank C, Understanding Economics Today, Homewood, Illinois, Richard D. Irwin, Inc. (1986) page 23. Also see Smith, Adam, The Wealth Of Nations, (1776).

free-market processes as being socially efficient and beneficial". 11. Bork avers "(b)usiness freedom is the route to efficiency because businesses want to make money and they can expect to do so in only one of two ways: being efficient (reducing costs or providing a better product) or exercising market power."

12. By utilizing their market position to enhance wealth, firms can further invest in capital for product or service development, which in turn advances state and national economies through increased employment and higher tax revenues. Tax revenues upon receipt can be allocated to social programs used to assist the citizens of a polity. If a firm cannot attain increased profits, either due to government interference or intense competition, it is argued that reduced earnings will result in a decline in efficiency, which will negatively impact the rest of society.

Chicago School advocates stress that government must not intervene in the operations of a particular business or market by utilizing antitrust laws. To do so would be to cause undue inefficiencies that ultimately harm society. A natural adaptive and selection competitive process must be allowed to exist for the greatest industrial growth. "Economic Darwinism" is the only process by which products and services improve in both quality and quantity, since firms will act in the best interest of their survival. 13. Armentano recognizes that when antitrust laws are actively enforced, they limit the liberty and freedom a

11. Armentano, D.T., "Comments On Tollison", Economic Liberties And The Judiciary, Edited by James A. Dorn, and Henry G. Manne, Fairfax, VA, George Mason University Press (1987) page 312.

12. Fox and Sullivan, "Lexicon", *Supra*, page 64.

13. James W. Brock, Review of The Economics Of Industrial Organization, by William G. Shepherd, In The Antitrust Bulletin, (Summer, 1991) page 503

business has to exercise its own property as it sees fit. This includes combinations and anticompetitive mergers that Populist advocates would see as damaging the overall economy. The antitrust laws by their very nature seem to interfere with and infringe directly on individual rights, on freedom to transfer through an exchange of legitimately held property. 14. He further avers that "(f)rom a strict libertarian or natural rights position, antitrust laws are inherently unjust". 15. If a business cannot independently utilize its own property, efficiency will suffer.

The Chicago School's supreme goal has been for industries to avoid inefficiencies, which are defined as artificial restraints on output. When inefficiencies occur, consumers are harmed because the ability of a firm to stimulate profits, invest and create better products and services is hampered, causing a drop in output and a subsequent price increase. Advocates of the Chicago School therefore "...conceived of competition...as exclusively a process to produce efficiency and they urged that efficiency should be defined not only in terms of benefits to consumers, but also, more specifically in terms of increased aggregate wealth: the sum of (increased) producer profits and consumer surplus (or what Robert Bork has called, 'consumer welfare')". 16. Instead of considering the numerical presence of firms, as defining competition, as the Modern Populist advocates had, Chicagoans expanded the interpretation of antitrust to consider the accumulation of profits by producers as a determining

14. Armentano, Supra, page 311.

15. Ibid.

16. Sullivan, E.T., Revitalizing Antitrust In Its Second Century, New York, Oxford University Press, (1991) page 91.

factor of a polity's economic well-being. Allowing a firm to attain greater profits will indirectly benefit consumers through the firm's increased output and lower prices, something that advocates of active antitrust enforcement strive to attain.

Ironically, scholars of the Chicago School have asserted that the application of state and federal antitrust laws themselves can create the very economic inefficiency they had hoped to avert. A brief hypothetical seems appropriate to support this claim. When the government brings a lawsuit against a firm, alleging some kind of illegal business activity that restricts competition, the defending firm of that action must first redirect some of its financial resources for legal representation. This government-forced monetary transaction, singularly causes a decline in the firm's capability to invest in new capital that can benefit output production. Beyond costly legal investment, if a court's judgment is ultimately decided against the firm's "monopolistic" behavior, the firm loses more money through paid damages and not being able to carry out its original intentions which have been deemed illegal. Indirectly, consumers also lose from this scenario, because firms will eventually have to reduce output or increase prices in order to minimize the loss of money.

Advocates of the Chicago School see the business community as being rationally defined in its behavior, and not apt to involve themselves in activities that would do harm to its primary profits base, namely consumers. If prices were artificially increased i.e. lacking competitive influence consumers could purchase a good or service from another firm or simply not buy goods at all. Therefore, it is not in business' interest to raise prices artificially above market

prices, since it would harm the firm's earnings. If earnings do happen to increase for a firm, and gains a dominant or monopolistic position in the market, other producers will be attracted to and enter the market. Antitrust law enforcement therefore should be limited since the market itself is naturally self-detering against the onset of monopolistic industries. Although most members of the Chicago School do not advocate the repeal of all antitrust laws, they do stress that the laws should be used for only the most blatant violations, such as bid-rigging. Easterbrook avers, "(t)he only concern of the law is misuse of power to restrict output, therefore there is no offense unless the dominant firm cuts output by acts that have no competitive merit...". 17. Bork is more explicit when he asserts that the only violations that should be prosecuted are those of "naked" or outright price fixing and market division by leading firms in an industry and horizontal mergers of monopolistic proportions...". 18. These activities simply do not promote increased output. Otherwise, markets should be allowed to naturally enhance efficiency, such as allowing smaller firms to merge and become more efficient as larger, cost-minimizing firms.

The Popular theorists refute many of the arguments espoused by Chicagoans as being too trusting of the business community and believing that all their actions will produce altruistic results. The Populists assert that since attaining wealth is the primary goal of the business community, firms have a heightened incentive to become involved in conspiracies that seek to constrict competition and protect their markets and profit standing. Even without conspiracies to monopolize

17. Easterbrook, Frank H., "The Limits of Antitrust", 63 Texas Law Journal 1, (1984).

18. Armentano, "Comments", *Supra*, page 311.

markets, the natural progression of competition itself may allow a firm to attain greater concentrated power. If such an occurrence developed legitimately, the power of that firm can ultimately still be used to harm consumers. Certain forms of concentrated economic power must therefore be tempered by antitrust policies and regulation in order to maintain the diversity of choice for consumers.

Maintaining the structure of competition is the primary assertion of the Populist School in the debate over antitrust interpretation. In fact, Fox writes that if the Chicago philosophical construct assumes dominant role in the debate, it would represent the first step toward a "corpocracy", where corporations become bloated with power and profits, yet are incapable of "...responding to dynamic change". 19. Without the ability to change, how will industry further expand and develop? Under such a scenario, corporations would become the primary constituents of the government, and be allowed to freely attain wealth, without the need to improve production output with a diminution of competition. Without the necessary government intervention, efficiency and consumer welfare, as the Chicagoans define them, would suffer.

"Critics of the Chicago School's exclusive use of economics by judicial and legislative decision-makers in matters of antitrust also argue that economic analysis ignores values, rights and anything that is difficult to quantify." 20. Fox notes, "(s)ocial welfare connotes the sum of the utilities of all people...such

19. Fox, Eleanor M., "Antitrust, Economics, and Bias", Antitrust, Chicago, American Bar Association, (Winter, 1988) page 9.

20. Fox, Eleanor M., "Antitrust, Economics, and Bias", *Supra*, page 8.

as personal preferences for autonomy, entrepreneurship, participatory governance and a range of choices". 21. These noneconomic considerations are never evaluated or prioritized by advocates of the Chicago School, but do remain important aspects of the U.S. and its individual states. A pure economic view is blind to the full panorama of what is important to individual citizens of a particular polity.

Armentano asserts that this populist view is based upon the fact that such values can in fact be measured. He observes, "...enforcement of antitrust is predicated on the mistaken assumption that regulators and the courts can have access to information social benefits, social costs and efficiency...". 22. Such information is just impossible to accurately assemble; consequently, the Populist School seeks nothing more than to structure industry in such a way so that many inefficient firms exist in markets. By maintaining such a structure, populists hope that the relished values of a polity are reflected simply with the presence of a competitive structure. In the end, they don't really know if those values are being exercised. The only way we can be certain that values are reflected in markets or economies is through results, and that means efficiency.

Not knowing the outcome of certain policies is the reason why governments debate all political questions concerning economics. Since the subject of economics examines inconsistent human behavior relating to the allocation and exchange of wealth, any subtopic associated with economics will not contain absolute answers. Consequently, neither school can claim exclusive truth in the

21. Ibid.

22. Armentano, Repeal of Antitrust, Supra, page 7.

antitrust debate. Each school thus determines what it feels is the correct interpretation of the generalized language used in antitrust legislation and policy, and then attempts to persuade and influence the process. "The Populists seem willing to sacrifice the Chicago concept of efficiency in order to preserve an atomistic economy made up of a multitude of different firms, thus ensuring choice through competition of numbers...while the Chicago School is willing to forego the presence of many firms if they are less efficient than their stronger competitors". 23. The Populists believe true competition exists only when the structure of the free market is populated by numerous competitors. When that structure sees a decline in numbers, either through artificial or natural means, government must live up to Louis Kelso's words, and adjust it to maintain a diversity of producers. Consumer welfare is therefore protected by direct action, whether through the passage of antitrust legislation or improving enforcement procedures.

Chicagoans feel competition is a natural process, that must be allowed to progress on its own, without any kind of interference. Even if a monopoly naturally occurs, the market will eventually correct itself by other firms entering concentrated markets. Illegal behavior is limited to only those activities that limit output. Consumer welfare can only be maintained when firms are allowed the liberty to act as they see fit to improve profits, and thereby improve production output. Wealth accumulation provides the means by which firms can continuously reinvest in production, as well as providing a

23. White, Barbara A., " Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation", The George Washington Law Review, Vol. 60 No. 1, (November, 1991) page 3

polity with noneconomic priorities, through accumulated corporate tax revenues that are allocated to social programs.

The interaction between these bi-polar ideologies is the basis for antitrust development at both the state and federal levels of governing. Both schools in their own way seek to enhance the efficiency of a polity's economy, they simply seek it through different means. Since economic behavior is constantly changing, members of government must constantly adapt the applications of antitrust laws to the given political-economic circumstances. This actually becomes almost a blending of the two schools as Joseph F. Brodley, Professor of Law at Boston University has observed. 24. In fact, antitrust is best seen as "...a running compromise in which distrust of power, both governmental and private, depend upon the voices of economists, businessmen, social reformers and lobbyists as they are heard in varying strengths at different times". 25.

The legislators and regulators of today possess a great deal of information and understanding of how and for what purpose business operates, how antitrust enforcement impacts those business operations, and what the ultimate consequences both have on a particular polity. The participants of the debate over antitrust determine their stance on the issue based upon what constituency they personally feel they represent. Once the constituency is acknowledged, they gravitate to one or the other of the two competing poles. And even though they may not explicitly express either school's philosophy in their writings or

24. Brodley, Joseph F., "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress", See Revitalizing Antitrust In Its Second Century, Edited by Harry First, Eleanor M. Fox, Robert Pitofsky, New York, Quorum Books, (1991) page 119.

25. Neale, A.D. and Goyder, D.C, The Antitrust Laws of the United States Of America, 3rd Ed., Cambridge, Cambridge University Press, (1980) page 443.

speeches, the basic thinking of each will be implicitly reflected in the votes and decisions that guide their antitrust policy.

CHAPTER THREE

ANTITRUST FEDERALISM: ECONOMIC TRENDS, POLITICAL REACTIONS

"Federalism is a system in which state and federal governments each strive to achieve the desires of their joint constituents and the goals of the nation." ¹

The purpose of such a system is to afford a method, in which each government has the capability of checking excessive political power, wherever it may be inclined to do harm against that shared constituency or those national goals. Yet, just as with a balance, when too little political power is exerted by one of these two governing bodies, the system affords the reciprocal effect by allowing the other body to compensate and maintain the national political or economic equilibrium. A worthy example of this concurrent process can be seen by examining the nation's dual antitrust system of enforcement.

The original creators of formal antitrust laws, the states hardly had the means to enforce violations once business operations exited their borders. Cooperation between state governments to jointly arrest violations was not feasible given differing statutory language and lack of formal means of communication between attorneys general. To compensate for the state deficiencies, the federal government enacted antitrust laws to provide protection in areas where state laws lacked jurisdiction in interstate commerce. Since the enactment of the Sherman Act and its statutory offspring (Appendix B), federal enforcement assumed the primary responsibility of ensuring that markets

1. Abrams, Robert and Constantine, Lloyd, "Dual Antitrust Enforcement in the 1990s", Revitalizing Antitrust In Its Second Century, Edited by Harry First, Eleanor Fox and Robert Pitofsky, New York, Quorum Books, (1991) page 500.

remained free from restraints of trade. The federal laws, which were meant simply to supplement state laws, actually ended up superseding them.

Throughout the twentieth century, businesses continuously expanded their operations across the nation, and consequently became intertwined with the well-being of the nation. The image of businesses being evil was replaced by a more benign and even benevolent persona, one that provided Americans with employment and consumer goods. The business community had the means of assisting the growth and advancement of a specific state's economy, as well as providing needed tax revenues to state government. The term "corporate laxity", entered the nation's economic lexicon. Corporate laxity was used to explain the reasons why states began to establish laws and policies, during the 1950s, that sought to provide corporations with easy procedures to obtain charters of incorporations from individual states. 2. The purpose of such policies was meant to attract corporate operation to states in order that the state could acquire the benefits of businesses. The idea of corporate laxity gradually expanded beyond simple incorporation procedures, and began to impact in other areas of legislation, eventually including antitrust. The overall purpose of corporate laxity policies was for government to create a conciliatory relationship with its important corporate citizens.

Prior to the 1970s, since antitrust enforcement was limited to federal authorities, such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC), state antitrust enforcement was minimal. Firms were

2. Schwartz, Eli, Corporate Finance, New York, St. Martin's Press, 1962.

not hampered by dual enforcement of antitrust laws. As more and more companies developed and business activities multiplied in numbers, the continuation of unilateral federal enforcement became more impractical. The stress on federal authorities to investigate and litigate every potential cases became impossible. This did not even take into consideration localized anticompetitive activity which lacked sufficient impact on interstate commerce to warrant federal intervention. The increasing burden on the DOJ and FTC reached a peak with the rise of consumerism of the late 1960s and 1970s.

Consumer trust in "Big Business" turned to skepticism following the social unrest of the 1960s. An unpopular war, exorbitant fiscal spending and high inflation had created an impression in the country that increased power of the federal government and corporate America became too concentrated and was leading the nation to collapse. Decentralization of both economic and political power was thought to be the only means by which to improve the country's political-economic status. National sentiment against centralized power, produced an atmosphere that became very conducive for a reinvigoration of state antitrust enforcement. Alan Maness cites a 1976 Wall Street Journal article which expressed this view:

"The consumer movement of the past decade and the recent rampant inflation have made Americans more sensitive to the way goods and services are priced. 'Consumerism, neopopulism and pervasive public economic restiveness' have contributed to the surging interest in antitrust activity at the state level..." 3.

The movement revealed an awareness among the nation's population, one that questioned the integrity of corporations' pricing and safety policies for products.

3. Maness, Alan D., "State Antitrust Enforcement: It's Evolution And Future Direction", The Antitrust Bulletin, Vol. 26, (Winter, 1982) page 830.

Helped along by consumer groups such as Public Citizen, private consumer groups began filing law suits against the business community for safety and antitrust violations. These actions were often confronted by corporations with abundant financial resources to fight the suits. Given consumer groups' limited financial resources, increasingly the groups looked toward Washington for assistance.

The excessive spending patterns of the 1960s could not be maintained. Consequently, Washington found itself in a difficult situation, where it needed enhanced antitrust enforcement, in response to consumer concerns, but lacked the finances and, some would say, the political legitimacy to do so. Accordingly it turned to the states to assist in relieving the antitrust burden. The Nixon Administration was first to create a revenue-sharing program that funnelled money to the states in order to enhance their enforcement policies. 4. This program was limited in its impact to those states, like New York, California and Kansas, that possessed state laws and enforcement agencies. The program did nothing for states like Pennsylvania, Delaware and Arizona which lacked the legal tools to carry out an enforcement policy. A more comprehensive federal plan was required to provide the impetus for increased state enforcement.

The Supreme Court provided the initiative for legislative action. In Eisen v. Carlisle & Jacquelin (1974), a private consumer group filed a suit against Carlisle & Jacquelin, for violation of antitrust laws, specifically price-fixing of their products. The Court, "...prohibited consumers from claiming litigation

4. Ibid, page 831.

costs in their suit...". 5., which meant that individual consumers would be unable to recoup the cost of bringing an antitrust case to court. Unless a consumer or group of consumers had a vast amount of funds, private parties would be incapable of financially pursuing antitrust lawsuits meant to protect consumers and markets. Congress was faced with leaving consumers, at the height of the movement that sought greater consumer protection, without practical means of fighting antitrust violations.

Reacting to the Court's decision, Congress enacted the Hart-Scott-Rodino Antitrust Improvement Act and the Crime Control Act, both of 1976, to stimulate greater enforcement activity by the individual states. The view of lawmakers was that by spreading a wide legal netting into the economic waters, more anticompetitive violators could be collected. Through federalism, the federal government sought to enhance the states' ability to affirmatively act in antitrust matters. By passing these laws, Congress also returned to the states a heightened sense of autonomy, something at least in terms of antitrust had not existed since the years prior to the Sherman Act.

The federal government was heeding the words of John Flynn of the University of Michigan, who in 1964, observed that "...legal theory, general policy and efficient administration seem to dictate that state antitrust enforcement would be necessary to combat restraints of trade".

6. He then elaborated on three types of restraints of trade that federal authorities would have difficulty enforcing. "The first restraint of trade are

5. Ibid, page 845. Also see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)

6. Flynn, John J., Federalism And State Antitrust Regulation, Ann Arbor, MI, Michigan Legal Publication, (1964) page 231.

those of an exclusive intrastate nature, that are outside the federal purview; the second are those within federal authority, but beyond federal government resources; and the third are those restraints which could most effectively, economically, and/or politically be remedied by the states." 7. Maness, writing in 1982, echoes Flynn's third assertion that when "...a considerable amount of anticompetitive activity at the local level cannot be controlled by federal antitrust enforcement bodies..." 8., there exists an "enforcement gap". Practical public administrative concerns, together with political pressure and an economy with high inflation, provided the impetus for enhanced antitrust enforcement by the states. Congress on its own volition wanted the states to fill the "gap".

The Hart-Scott-Rodino Act was created, in part, to augment the difficulties consumers would certainly have relative to their rectifying anticompetitive activities, after the Eisen case. The Act required that:

"...the Attorney General of the United States must notify his state counterparts of possible antitrust violations affecting their respective states and to share with them certain investigative materials and empowered state attorneys general to maintain federal, *parens patriae*, treble damage antitrust actions for their respective consumer-citizens". 9.

Hart-Scott-Rodino allowed the states to use federal antitrust laws in cases brought to federal courts, as "guardians of the state" i.e. *parens patriae*, when consumers were harmed or when the state was harmed by anticompetitive

7. Ibid.

8. Maness, *Supra*, page 831.

9. Antitrust Section, Antitrust Federalism: The Role Of State Law, Monograph 15, Chicago, American Bar Association, (1988) page 4.

activities. State attorneys general were capable of seeking "triple" i.e. treble damages if a violation of federal law was flagrant. If such a case existed and a court might determine that a defendant-company actions were intentional, instead of that company paying its original \$100,000 liability, it would pay a \$300,000 liability. The actual intent of treble damages was to create a device that would deter antitrust violations from occurring. With a favorable ruling, an attorney general would be able to provide injured consumers with an equal division of the monetary reward.

The business community immediately reacted to Hart-Scott-Rodino delegation of federal authority to the states with great condemnation. Business lobbyists began their attempts to influence federal lawmakers when Hart-Scott-Rodino was still a bill. Their arguments included the claim that even though states would not be capable of utilizing federal laws outside their borders, interstate corporations would face suits in any one of fifty-one antitrust jurisdictions between the federal and state governments. If suits in multiple jurisdiction would arise, the company would have to incur a substantial loss of wealth in legal expenses. "Business also lobbied against the legislation, arguing that ambitious (elected) attorneys general would file frivolous suits under this authority, just to win votes." 10. The abuse of newly attained powers was seen as a very real possibility. Yet, in the end, these Chicagoan arguments fell upon deaf ears in Congress, as antitrust proponents asserted that if companies did not participate in restraining trade, such a reapportionment of funds would not be needed. Supporters of the legislation also asserted that cooperation between the states

10. Maness, *Supra*, page 846.

would actually take place, through multi-state antitrust cases, which would conserve resources and not grossly overburden the business community.

In the end, corporate interests were unable to dissuade Congress from enactment, and yet, lawmakers did leave the final decision on the *parens patriae* power up to state legislatures. "Congress included a provision in the Hart-Scott-Rodino Act giving each state legislature the right to deny the *parens* authority to its attorney general...." 11. Business shifted their emphasis to state legislatures, in attempts to thwart the *parens patriae* authority from being accepted by the states. One such lobby was the National Association of Realtors.

Maness indicates in footnote 131 of his article that the National Association of Realtors mounted a challenge nationwide in most states to defeat the sharing of federal antitrust powers. 12. After their state lobbying efforts were also met with negative responses, in Missouri, the Realtors abandoned their efforts in the face of powerful pro-antitrust consensus. In the end, all 50 states accepted the *parens patriae* authority for their attorneys general. Approval by the state legislatures provide more evidence of pervasiveness of the consumer advocacy and protection movement.

The federal government was prepared to share legal authority with the states, yet for those states without tangible personnel and funds, enforcement of that authority was impossible. Therefore, in order to help in shifting of the antitrust

11. Ibid.

12. Ibid, page 885.

burden to the states, Congress included an amendment in the Crimes Control Act of 1976, that provided, "...\$21 million in grants as seed money for state attorneys general to develop antitrust divisions in their offices". 13. Since the money was provided to all states, the Act was a windfall for those states without state antitrust protection and provided a sense of renewal for states with existing enforcement programs. "It provided the resources that enabled 25 states to create antitrust divisions within the offices of attorneys general for the very first time." 14. If money is the maternal device of governmental programs, then the Crime Control Act of 1976 bore and nurtured 50 state antitrust enforcement agencies. Pennsylvania was one of those states.

The twin laws of 1976, signaled Washington's willingness to activate the states' "concurrent" antitrust powers in order to assist consumers during the inflationary period of high prices. Legal authority was delegated with actual monetary grants revealing federal lawmakers' sincere desire for action. Congress provided for an administrative policy that sought to alleviate the federal antitrust enforcement burden, as well as react to popular consumer concerns.

Law enforcement officials often measure success of a new statute, by the number of filings it generates. If this is an appropriate empirical measure, the Congressional actions of 1976, proved to be successful as filings of "...federal cases doubled from 206 in 1977 to slightly over four hundred in 1979". 15.

13. Farmer, Susan Beth, "Introduction: Dual Enforcement Of State And Federal Antitrust Laws", Antitrust Law Journal, Vol. 58, Issue 1, Part II, Chicago, American Bar Association, (1989) page 198.

14. Maness, *Supra*, page 83.

The American Bar Association's report on antitrust federalism reported that "(s)ince 1976, antitrust activity has continued to increase to the extent that...a former Assistant Attorney General of the (U.S.) Antitrust Division, Robert Baxter, has predicted that by 1996 antitrust law 'will be primarily enforced by the states...'" 16. The cycle of vigorous antitrust enforcement which had reached an apex during the mid to late 1970s was largely created by the economic trend of high inflation. This trend provided the impetus for necessary political reaction from Washington. The result was increased state involvement in their dual role as antitrust enforcers.

Federal authorities hoped that by providing states with antitrust powers and grants the states would be prompted to create state laws as well as innovative financial mechanisms in order to independently support their enforcement programs when grants ended. The Acts of 1976 represented only a single route to bring cases to court, and they were not to be relied upon exclusively. Actually states had begun a process of enacting their own laws as "...ten states created new laws between 1970 and 1975...." 17. After the twin laws of 1976 were enacted, "...thirteen more states incorporated new laws into their body of statutes, between 1976 and 1987". 18. States began to practice "multidistrict litigation", wherein attorneys general combined their staffs and resources to jointly investigate and prosecute antitrust violations. Since some antitrust agencies could not rely on state budget for financing, they had to rely on

15. Ewing, Ky P., "Overview Of State Antitrust Law", Antitrust Law Journal, Vol. 56, Issue 1, American Bar Association, (1987) page 104.

16. ABA Monograph 15, *Supra*, page 5.

17. Ewing, *Supra*, page 105.

18. *Ibid*.

resource claimed from monetary awards gathered from disposed cases. These agencies found it necessary to bring cases in order to ensure their survival, but found it difficult to bring cases given their limited funds.

"Multidistrict litigation held a number of attractions for state attorneys general, the most important of which was the opportunity for larger recoveries with a minimum expenditure of time and money." 19. State antitrust agencies with limited funds could be a part of litigation, given their ability to lean on agencies possessing extensive finances, and larger staffs. Cases under this form of litigation were federal lawsuits, pursuant to *parens patriae* and were normally led by one state that had extensive investigative powers. Consequently, California and New York were often leaders in multidistrict cases. The states did become innovative in pursuing antitrust enforcement, not solely by enacting their own law, but by utilizing a "pooling" strategy to bring cases against violators. Ironically, the method by which they jointly litigated was not unlike the business trusts and combinations they were combating.

In light of activist state enforcement, antitrust critics continue to argue that such a trend had the potential of unravelling into economic fratricide between the states, not to mention heavy burdens upon businesses. In reality, the opposite effect occurred, primarily due to the multidistrict litigation device. A corporation, instead of confronting several identical cases, was faced with one multistate case. From the late 1970s, cooperation has been the trend as states have also practiced a form of "conscious parallelism" in constructing their statutes. Despite some variations in the statutory language between state laws ____

19. Maness, *Supra*, pages 836-837.

they have been constructed in a manner consistent with federal law and thus with each other. 20. The purpose of which was and continues to be an avoidance of "balkanizing" the national economy, the very fear shared by antitrust critics. To that end, a Uniform State Antitrust Model Statute was developed, for use as either an actual legislative bill or as a base for state legislatures from which to work. Created in 1973 by the National Conference On Uniform State Laws and approved by the American Bar Association in 1974, the model intends to advance state antitrust involvement, while stressing the importance of consistent standards state to state. The Model Act also has stressed the importance of the state judiciary adhering to the dominant federal antitrust precedents, in order to avoid possible conflicts. The Uniform State Antitrust Act's Prefatory Note reflects these views:

"If state antitrust legislation is to form an integral part of our overall antitrust policy, the burden of compliance with the antitrust laws of the several states must be abated by the adoption of a uniform state antitrust act...Given this uniform Act paralleling substantive federal antitrust compliance with federal law will be tantamount to compliance with all antitrust law...(A)n important advantage of uniformity is the avoidance of litigation to resolve difficult questions as to (application) of state law." 21.

Although only five states have to date, adopted all or parts of the Uniform Model 22., its utilization as a guide for state legislatures has been and will remain immeasurable. The reason that states decided not to adopt the statute has been attributed to the fact that existing state laws were already in harmony with

20. State Attorneys General: Power And Responsibilities, Edited by Lynne M. Ross, Washington, D.C., The Bureau Of National Affairs Inc., (1990) page 236.

21. The Michigan Antitrust Reform Act (MARA), Section 445.761, Prefatory Note, (March 29, 1985) page 200.

22. The five states that have enacted either all or portions of the Uniform State Antitrust Model Act are: Arizona (1974), Delaware (1980), Iowa (1985), Michigan (1985) and North Dakota (1987).

federal laws and with each other. What was already known by many state governments was formalized into a model statute, so that other states remained consistent with the nature of concurrent antitrust powers.

Notwithstanding the states' attempt to remain consistent with federal laws and precedents, there were and remain opportunities for state antitrust construction and interpretations to conflict with federal laws. Conflict occurs when a business attempts to adhere to one law, and in so doing violates the second. When such a situation arises, the United States Constitution stipulates, through the Commerce and Supremacy Clauses, that the federal law must be held supreme and governing. Yet, does a state law automatically create a cause for federal preemption ? The answer to this question is found within the intentions of Congress in establishing federal antitrust law.

Determination of applicability of federal preemption pursuant to the Supremacy Clause of the United States Constitution 23., is determined by three factors, as established by Louisiana Public Service Commission v. FCC. 24. In that case, the Court determined that when a state law is in conflict with a federal law, and Congress has explicitly precluded state law, the conflicting state law can be preempted. The Court also ruled if Congress implicitly expressed an interest in "occupying the field", i.e. regulating an activities, again the state law can be preempted by the federal law. Finally, if the state law directly conflicts with a federal law, and compliance with both is impossible, the state law must fall in favor of the federal law. 25. If any one of these factors can be fulfilled, the

23. U.S. Constitution, Article VI.

24. Louisiana Public Service v. FCC, 476 U.S. 355 (1986).

25. ABA Antitrust Section; Monograph No. 15, Antitrust Federalism: The Role of State Law, (1980) page 11-12.

Supremacy Clause may be invoked.

Yet, the Congressional history of antitrust however has provided evidence to the contrary. The enactment of federal antitrust laws was not meant to supercede state laws, but actually intended to supplement and support them. Congress has neither explicitly or implicitly preempted state antitrust, rather it promoted and enhanced state capabilities. As Senator Sherman stated with regard to the purpose of the Sherman bill, "...it is hoped to supplement the enforcement of established state law...and cooperate with state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States". 26. These words, which were also included with the report that accompanied the bill, leave little doubt that Congress believed state laws should be maintained.

Almost a century later, Congressional actions of 1976 provided still more evidence that antitrust enforcement was identified as being carried out by the federal and state governments. In that year, state enforcement was recognized explicitly, implicitly and even financially by the Hart-Scott-Rodino and the Crimes Control Acts, as a viable part of the nation's approach to policing restraints on trade and commerce. This Congressional recognition has generally upheld state antitrust laws in the face of the first two standards set by the Louisiana decision. The third factor has been the primary means by which the Supremacy Clause has preempted state antitrust laws. The case of Illinois Brick

26. Farmer, Susan Beth, "The State of State Antitrust Enforcement", Antitrust & Commerce Report, Washington, D.C., National Association of Attorneys General, (October, 1987)page 1.

v. Illinois 27., provides a good example of concurrent conflict and the application of the third standard.

The Supreme Court's Illinois Brick decision of 1977, stated that indirect purchasers (those who buy goods from retailers or other middlemen) could not claim damages, under federal law, as the result of price-fixing of a producing firm. The Court believed that by ruling in favor of indirect purchasers, another group of potential plaintiffs beyond direct purchasers would be created and overburden the legal system. It was also believed by providing another federal avenue of legal recourse would unduly hinder producers of goods. Supporters of consumer protection were outraged by the ruling. They maintained that the overall effect of price fixing did not harm direct purchasers as much as it injured indirect purchasers, since direct purchasers would naturally pass on any overcharge, whether natural or artificial to the consumer buying a particular product.

After the decision, states found it very difficult to utilize their federally delegated parens patriae authority to protect consumers from price fixing. The decision also incapacitated their ability to protect their own state agencies, since they too were consumers of various goods. "The impact of the Illinois Brick decision on state antitrust enforcement was catastrophic...as states spent billions of dollars yearly in the procurement of goods and services for state and local governments". 28. Consumers were also unprotected by the state attorneys general since state law and court rulings tended to follow federal law very

27. Illinois Brick v. Illinois, 431 U.S. 720 (1977).

28. State Attorneys General: Power And Responsibilities, Edited by Lynne M. Ross, Washington, D.C., The Bureau of National Affairs Inc., (1990) page 242.

closely. Although Illinois Brick governed only federal law, it was recognized as the ruling precedent for state law as well. Antitrust enforcement therefore, at both levels of federalism could not combat one of the more flagrant antitrust violations, price fixing. Consumers unknowingly lay waiting for industry to prey upon them, unprotected due to the impotence caused by a Supreme Court decision.

Unsuccessful attempts to bring price-fixing case eventually prompted states to break with the federal precedent and began to pass statutes that allowed indirect purchasers to claim recovery, and allowed attorneys general to practice *paren patriae* authority at the state level. These laws having broken with their parallel with federal law, eventually forced conflict within the system of federalism. Different state and federal courts began to provide conflicting opinions concerning the state indirect purchaser and *parens patriae* laws, laws meant to circumvent the Illinois Brick decision. "The Federal Court of Appeals for the Ninth Circuit, ruled that Illinois Brick repealers are preempted because they frustrated federal antitrust policy." 29. Conversely, "a California intermediate appellate court ruled that a California repealer was not preempted". 30. Supreme Court action would again be required in order to resolve the conflict.

In 1989, California v. ARC America Corp. involved the California Attorney General sued on behalf of indirect purchasers who were being injured by the price-fixing activity of the defendant company. 31. The case represented the

29. Antitrust Section, Monograph 15, *Supra*, page 26.

30. *Ibid.*

31. California v. ARC America Corp. 490 U.S. 720 (1989).

conflict between a state Illinois Brick repealer law and the Supreme Court's Illinois Brick decision of 1977. The Court recognized the duality of antitrust enforcement and the autonomy of state efforts to protect their citizenry from anticompetitive harm. So in language not unlike that of Senator Sherman, the Court stated:

"...the long history of state common-law and statutory remedies against monopolies and unfair business practices...Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." 32.

With this statement, the Court ruled in favor of upholding the California repealer law, by a unanimous decision. States could protect indirect purchasers if they retained statutory authority to do so under state law. The Supreme Court decision did not however change federal judicial philosophy relative to the indirect purchasers. Consequently, those states that relied upon federal law to sue for indirect purchasers remained impotent. States without an antitrust law, that included an Illinois Brick repealer clause therefore continue to allow their consumers to be exposed to price-fixing.

Even though the Court retained its prohibition on indirect purchaser claims under federal law, the ruling was very advantageous to those states with repealer laws, as well as state parens patriae authority. Pfunder called the ARC case, "...extremely significant...because it seems to endorse broad, largely unfettered participation by the states in antitrust enforcement activity". 33. The Court's ruling came after almost a decade of reduced federal antitrust enforcement under

32. Pfunder, Malcolm R., "Constitutional Limitations On State Antitrust Enforcement", Antitrust Law Journal, Vol. 58, Issue 1, Part II, Chicago, American Bar Association, (1989) page 211.

33. Ibid.

the Reagan administration. Without extensive federal protection, state enforcement had to be provided. The unanimous support for the decision by the Justices, seemed to reveal this fact. At the least, the Court had granted greater state autonomy in determining the application of state antitrust law. The Supremacy Clause's influence in preempting state law was substantially reduced by this case. And yet, the benefits of the ARC ruling could only be garnered by those states retaining their own repealer laws. States without such laws remained bound by Illinois Brick.

The second Constitutional clause capable of preempting state antitrust statutes is the Commerce Clause. The clause states that, "(t)he Congress shall have power...to regulate commerce...among the several states...". 34. Since the Gibbons decision, the Supreme Court had identified federal laws as holding primacy in matters of trade and commerce. Yet, the state antitrust laws were unique and not automatically held to Gibbons standards. Conflict occurs over matters of policy, as decided by the federal executive branch and state attorneys general. When this arises, courts will examine the intent of Congress, when it established the federal law that is in conflict with a state law. Since state laws have mirrored the federal statutes and state courts have tended to remain consistent with federal precedents, conflict rarely occurs over law. This has been especially true after the ARC decision. Conflict arises when an intrastate antitrust action is filed has an impact upon interstate commerce. According to the Supreme Court:

34.. U.S. Constitution, Article I, Section 8, Clause 3.

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 35.

Pfunder, who identifies Article I, Section 8, Clause 3, as the "dormant Commerce Clause", adds that since states do not directly seek to impact interstate commerce, preemption should only be invoked if the benefits to the local concern are small compared to the burden to interstate commerce. 36. Since a state can only seek to redress negative anticompetitive activity within its own borders, the likelihood of excessive burden to interstate commerce is minimal. Until the application of a state law causes a great hinderance on interstate commerce, preemption will generally not applied.

The material that has been presented thus far provide the context for the study of Pennsylvania that follows. One must always remember that the "past is prologue". The first chapters of this thesis have established that a history of dual antitrust enforcement has existed within this country, one that has been supported by Congressional intentions and Constitutional interpretations. Dual enforcement has also been grounded in the political and public administrative decisions of the federal executive branch, occurring primarily since the consumer protection movement of the 1970s. Congress' unilateral actions in response to the Supreme Court's Eisen decision provided the greatest impetus for increased state enforcement. The foundation of state enforcement as established by the twin laws of 1976, were tested by the inaction of the Reagan

35. Antitrust Section, Monograph 15, Supra, page 9.

36. Pfunder, Supra, page 212.

administration's antitrust policies.

The policies of the Reagan administration were guided by the marriage of two basic philosophies, New Federalism and the Chicago School of antitrust thought. The former emphasized the need to reduce federal involvement in areas thought better regulated by state and local governments, while the latter emphasized reductions in the level of antitrust enforcement as a means of stimulating greater economic efficiency. This ideology did indeed produce its intended outcomes, although the Chicagoan ingredient of the theory must have been disturbed by increased state antitrust. In the final analysis, the Reagan administration became a great purveyor of a heightened level of state activity in antitrust matters. By its actions it had continued a tradition of enforcement federalism and heeded the words of Felix Frankfurter. In 1925, Frankfurter, an eventual Supreme Court Justice, said:

"The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths 'state rights' and 'national supremacy'. We must not deny ourselves new or unfamiliar modes of realizing national ideals". 37.

The material that has been exhibited shows that the case for antitrust enactment in Pennsylvania is not an arbitrary or meaningless effort. Quite the contrary, it is an effort that seeks to align the Commonwealth with the rest of U.S. states in antitrust enforcement matters. The political positions found in the Pennsylvania debate will naturally draw from the arguments displayed in the foregoing chapter on competing antitrust philosophies and from perceptions of how effective dual enforcement has been during the history of antitrust laws in the United States.

37. Abrams, Robert and Constantine, Lloyd, "Dual Antitrust Enforcement in the 1990s", Revitalizing Antitrust In Its Second Century, Edited by Eleanor Fox and Robert Pitofsky, New York, Quorum Books, (1991) page 500.

CHAPTER FOUR

PENNSYLVANIA: THE FINAL STATE

During the three most prominent periods of enacting state antitrust laws: 1) the industrial revolution (1889-1904); 2) the consumerism of the 1970s; and 3) the Reagan administration (1981-1989), forty-nine states have all determined it necessary to create their own statutes in order to protect their economic markets. To the contrary, Pennsylvania has refused to adopt a comprehensive antitrust law. The reasons for this refusal are not simply a question of legislators adopting one philosophical school or another, or listening exclusively to one interest group or another. The complexity of the issue for Pennsylvania lies within the events that have unfolded over the past seventeen years in which state have become more aware of their heightened involvement in antitrust enforcement. By looking at the Pennsylvania debate since 1975, it will become more clear that what actually exists in the state today is a balance between proponents and opponents of antitrust. It is a balance that legislators have achieved through a competition over ideas as to what represents the "public welfare".

The limited scope of this study does not provide the means by which to fully determine the reasons for antitrust's absence in Pennsylvania, prior to the 1970s. Yet, given the dominance of federal antitrust enforcement, together with the Commonwealth's highly industrialized nature, particularly in the coal and steel industries, provide reasonable explanation as to why legislators had no incentive to enact a state antitrust law. With federal antitrust protection in

place and with the state benefitting from the presence of corporations that provided employment for the state's citizens and revenues for the state's treasury, there was simply no reason to enact such a law or establish an enforcement agency . If violation did arise, existing common law protections was thought sufficient, especially after the Supreme Court decision in Georgia v. Pennsylvania Railroad (1945) 1. An equilibrium was seemingly established between the ability of corporations to develop and the existence of some consumer protection.

The first serious consideration of enacting a state antitrust law, did not arise until the development of the consumers movements of the 1970s. Two years after the Uniform Model State Antitrust Act was created, the Pennsylvania legislators introduced three bills, at least one of which mirrored the model act. 2. Although the attempts did have the support of Governor Milton Schapp, who emphasized that the issue was a priority of his administration, limited legislative support meant their eventual demise. 3. Given the lack of wide spread support, the Chairman of the State Government Committee was able to block the House bill from further consideration. And although the Senate bill was accorded greater consideration, it too eventually languished in committee.

Failure of the measure in 1975 was attributable to lawmakers' lack of substantial knowledge of the purpose and impact of state antitrust laws. When

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1. Georgia v Pennsylvania Railroad, 324 U.S. 439 (1945). See note
 2. The 1975 bills were House Bill 174 and Senate Bills 216 and 369. See Cumulative Legislative History of Pennsylvania, (1975).
 3. Kandell, Ellen, "Pennsylvania's Antibid-Rigging Act: A First Step Towards An Antitrust Law Or The Only Step ?", 30 Villanova Law Review 63, 106, (1985).

ignorance exists, it may be exploited by those seeking either enactment or defeat of a particular measure. In a briefing conference presented by the Philadelphia Bar Association and Pennsylvania Bar Institute indicated that none of the bills under consideration utilized the Uniform Model Act. 4. This assertion was contrary to information found in a 1985 article which cited evidence that one of the bills, SB 216, matched the Model Act. 5. Whether the Bar Association's briefing conference was actually discussing another bill and neglected to identify SB 216 is not known. The point of this example is that differing information sources existed causing uncertainty among lawmakers as to the true meaning of the issue. When uncertainty takes hold within a legislative process, inaction will result and that is what happened to the antitrust issue in the 1975/76 Legislative Session.

The essence of the 1975 Senate effort, SB 216, was reintroduced during the next legislative session, again with the hope of enactment. It was certainly hoped that the recognition Congress had given state enforcement through its acts of 1976, would prompt state legislative action. But little had changed in the bill's language, and with the legislature examining Hart-Scott-Rodino, consideration of a second antitrust measure was too optimistic. The bill was introduced into the Senate Business and Commerce Committee, but no further action was taken on the measure. 6.

After the U.S. Congress passed the Hart-Scott-Rodino Act and the Crime

4. Antitrust And Trade Regulation, Briefing Conference Presented by the Professional Education Committee, Philadelphia Bar Association and Pennsylvania Bar Institute, PBI Publication No. 60, Philadelphia, (June 20, 1975) page 10.

5. Kandell, *Supra*, page 103.

6. *Ibid*, page 107.

Control Act in 1976, states had greater legal and financial incentive to become active in antitrust enforcement. Pennsylvania eventually approved transferral of the *parens patriae* authority to the state attorney general and thereafter received federal grants to commence a state enforcement agency. Rejecting the federal acts would have been unwise for the state lawmakers. The political repercussion would have been high, given the constituent concern for high inflation and the fact that grants were included with acceptance of *parens* authority. State legislator rarely were inclined to reject federal dollars.

The Pennsylvania Office of Attorney General established its antitrust section in 1979. The political fall-out from the business community was limited especially after the attorney general's use of his new powers became limited due to the Illinois Brick decision of 1977. Pennsylvania lawmakers thus attained a political windfall, one that benefitted their image among consumers by the establishment of an antitrust division. At the same time this action did not tarnish their relations with the state's business community since the power of that division was limited due to a Supreme Court ruling. A populist objective was fulfilled, without unduly interfering with the efficiency of corporations operating within the state.

The United States continued to be infected with high levels of inflation through 1979. The ill effects of high prices for goods and services were felt throughout the Commonwealth, forcing large transfers of wealth from consumers to producers. Not knowing if artificial restraints were causing the continued high prices, Governor Richard Thornburgh proposed a state antitrust measure, which was to enhance antitrust protection beyond the federal *parens patriae* authority.

The bill House Bill (HB) 1594 was introduced in 1979. The administration asserted in 1980 that, "...the absence of such a statute costs Pennsylvania consumers \$5 million a day". 7. Releasing this figure and its connection with the antitrust bill enhanced the posture of antitrust's public acceptance, not to mention the consumer approval of the governor. Having been elected on a platform that sought to resolve the state's economic problems, Thornburgh advocated antitrust as a means of upholding that pledge. The bill contained language consistent with the federal statutes, and acknowledgment of an intent to honor federal judicial precedents, including the Illinois Brick decision. 8. Lawmakers were attempting to make it amicable with the business community.

The greater public awareness which was afforded the issue by the governor, could not mobilize consumer-citizens to rally in support of antitrust measures. The public although concerned by high inflation found it difficult to rally around a complex set of laws. The issue of antitrust itself is inhibiting, because it no longer represents a debate between good and bad. Citizens identified businesses with employment more than anticompetitive behavior. Without a specific anticompetitive abuse or serious crisis, the public remained largely inert. "Ordinary folks" no longer understood the impact the laws had upon their lives, something that was easily understood, during the original period of state enactment. The broad language of those original laws had been replaced by legalese of exemptions, court rulings and legal precedents, things that were not readily comprehensible. Without grass-roots popular support, interest groups

7. Ecenbarger, William, "Antitrust Measure is Dead: Lobbyists Fend Off Antitrust Law", The Philadelphia Inquirer, (June 16, 1980) page 1-D.

8. Kandell, Supra, page 92.

readily enter the fray, and begin to influence the process for their advantage.

Still the support of Governor Thornburgh at least provided the potential for a bipartisan coalition between a Republican governor and Democratic, who traditionally supported consumer protection issues. Such a coalition seemingly could avert attempts by lobbyist to thwart the antitrust effort. Morehouse notes how, "...party government under the leadership of a state's chief executive is especially critical in preventing well-organized special interest from dominating public policy outcomes at the state level". 9. Yet, in the absence of popular voter support for antitrust, lawmakers were relatively free to determine their position on the issue according to their own personal beliefs, to their own political and even economic self-interests. Often a final decision could be influenced by powerful interest groups, who played upon the more personal interests of legislators.

The measure supported by Thornburgh, House Bill (HB) 1594, was introduced into the House State Government Committee, which was chaired by Representative L. Eugene Smith (R-Jefferson), who was a devout antitrust opponent. In fact Smith was instrumental in thwarting the 1975 and 1977 efforts in the House. Discussing HB 1594, he stated that, "...he had no intention of holding hearings on the bill or bringing it to a vote in his committee...as he was philosophically opposed to the bill because it would create another level of the state bureaucracy". 10. Smith was joined in his efforts by the state's largest business organization and lobbying group, the Chamber of Business and

9. Morehouse, Sally McCally, State Politics, Parties and Policy, New York, Holt, Rinehart and Winston, (1981) page 239.

10. Ecenbarger, Supra, page 1-D.

Industry. The Chamber added to Smith's averment by questioning the practicality of enacting law that was outdated. In an edition of its weekly newsletter, the Chamber wrote:

"Currently, the federal Sherman and Clayton acts cover anti-competitive activity that affects interstate commerce and just about everything is in interstate commerce. The argument that Pennsylvania is the only state without an antitrust statute isn't that persuasive, as many states have laws which are moribund." 11.

Together, Smith and the Chamber argued that state antitrust laws were antiquated in nature and burdensome to business and interstate commerce. These arguments amplified the ideas of Chicago antitrust theorists, who stressed that excessive utilization of antitrust laws ultimately forces a decline in corporate efficiency, which in turn lowers corporate profits. In order to make up lost profits, companies logically would increase prices to consumers, which was contrary to the intent of antitrust enforcement, and a prime example of "the antitrust paradox". In 1978, Robert Bork wrote a book entitled, The Antitrust Paradox: A Policy At War With Itself, to exemplify antitrust's inability to recognize its negative impact upon consumers. Bork observed that the enforcement of antitrust law, intended to protect "consumer welfare", actually injured consumers by not considering the efficiency of business, and that efficiency's connected with the welfare of consumers. 12.

Bork's primary concern is that antitrust laws have been produced by people who had little knowledge of the impact the laws would have on an economy. 13. These arguments were utilized effectively by the Pennsylvania Chamber of Business

11. Ibid.

12. Bork, Robert H., The Antitrust Paradox: A Policy At War With Itself, New York, Basic Books, Inc., Publishers, (1978) pages 418-419.

13. Ibid, page 7.

and Industry during the 1979/80 debate.

State lawmakers who had little working knowledge of antitrust matters and the relative impact of those laws upon an economy, tended to believe the arguments posited by the Chamber and other opponents of the antitrust measure. Legislators concluded that since they had just approved the *parens patriae* authority to the attorney general, any further state regulation might become too great of an immediate burden on the state's corporate citizens. Inaction on the antitrust issue was also important since 1980 was an election year and legislators were hesitant to position themselves on a controversial issue, such as antitrust. Although voters remained inactive on the antitrust issue, incumbents certainly did not want to create the impression that they were against "consumer protection". In the end, legislators could point to their approval of *parens patriae* powers for the state, and remain inactive on the state antitrust issue so as not to offend businesses.

William S. Comanor has observed, "(t)he political environment of antitrust rests not so much on its connection with partisan politics, as on the role played by conflicting personal and political interests and their impact on policy formation". 14. The 1979/80 Pennsylvania debate shows Comanor's observation of antitrust to be correct. In doing so his observation refutes the argument made by Morehouse, who stated that party government generally can avert the influence of lobbyists. Since antitrust involves the most vital aspect of a polity, the economy, lawmakers tend to determine their position by their

14. Comanor, William, "Antitrust in a Political Environment", The Antitrust Bulletin, Washington, D.C., Federal Legal Publications, Inc., (Winter, 1982) page 734.

economy experiencing different economic trends, antitrust enactment and enforcement is viewed differently. Political party leadership is thus negligible, while constituent desires are substantial.

Even with the appearance of bipartisan support led by the governor, House Bill 1594 eventually died in committee. Its death was due in large part to the joint efforts of Representative Smith and the Pennsylvania Chamber, who created two legs of a legislative "iron triangle" 15., that was sufficient enough in an election year to thwart the antitrust effort. State enactment simply did not have enough political capital, for incumbent legislators to risk taking a position on a controversial issue. Their own self-interest was the determining factor.

The idea of political, even financial self-interest as determining the fate of HB 1594, was exemplified in a Philadelphia Inquirer article that attributed Chairman Smith's combative posture towards antitrust to his own private interest. Smith, who owned a retail tire business, "...denied that there was any relation between his inaction on the bill and his private business...". 16. The Inquirer article then noted that in 1978, the Maryland Attorney General had sued tire dealers within that state for exclusive arrangements with oil companies. Smith denied that there was an association between his business and his views on the bill and it therefore could not be determined if a causal relationship existed.

15. An "iron triangle" is generally made up of three legs: 1) a powerful legislative committee leadership; 2) an interest group; and 3) a member of the bureaucracy, that together create an impregnable barrier to legislation unwanted by the triangle's membership. The third leg of the bureaucracy was missing from the 1979/80 debate, but given the self-interest nature of the antitrust issue and the fact that the second half of the session occurred in an election year, two legs were sufficient.

16. Ecnabarger, *Supra*, page 8-D.

What should be emphasized is legislators rationally seek to maximize their own personal political benefits and this seems to be evident in the 1979/80 debate. In the end, partisan party leadership, which tended to support the antitrust measure were unable to overcome the bipartisan politics of self-interest.

The 1980s represented a period of reduced federal enforcement and the first elected Pennsylvania Attorney General, LeRoy Zimmerman, attempted provided the minimum level of state protection against anticompetitive behavior. Although the state's enforcement unit was limited by its *parens patriae* authority not only by an inability to prosecute on behalf of indirect purchasers, it was also not provided with investigative subpoena power. The power to demand corporate submission of paper, documents and other information, together with appearances by witnesses was and remains the most controversial aspect of the Pennsylvania antitrust debate. Proponents believe it is important for the attorney general to have this power not simply to procure evidence, but to more accurately identify whether or not violations actually take place. Opponents of antitrust conversely believe the power would be abused by the state's elected attorney general through the filing arbitrary cases against businesses to garner support among consumer-voters. The debate consequently involves those who seek protection from too much government power and those seeking to arrest too much private power over economic markets.

Even with limited investigative powers and an inability to certain cases, the Pennsylvania enforcement was able to maintain marginal protection as witnessed by successful cases. In 1986, the Commonwealth achieved its most notably effective enforcement of federal laws within its borders. In Pittsburgh v. May

Department Stores Company 17., Attorney General Zimmerman joined a suit that was filed on the behalf of the City of Pittsburgh to stop the merger between Associated Dry Goods and May Department Stores, because it was believed that such a combination would diminish competition and harm the Pittsburgh economy. The suit was brought under a common law principle established by Georgia v Pennsylvania Railroad (1945). 18. "In that case, Georgia charged that the railroad company conspired to fix prices and give preferences to other localities, thereby injuring Georgia's economy." 19. The Supreme Court ruled in favor of Georgia, and in doing so, established a precedent wherein a state could sue a particular combination in trade that threatened a state's economy. Pennsylvania, believing that sufficient harm would result from the merger of the stores, filed suit for injunctive relief.

Unfortunately, the Attorney General's office did not have the investigative powers to procure information concerning the merger. Evidentary material was not available even though the pre-merger filings that companies must submit with the Federal Trade Commission, were legitimately available to state attorneys general. Federal authorities, who considered the information classified, however refused to share the filings with Pennsylvania authorities. Without information on the merger, the Commonwealth continued in its efforts to stop the business transaction, and was eventually able to ensured divestiture from the stores and maintained the market structure of two department stores.

17. City of Pittsburgh v. May Department Stores Co. 1986-2 Trade Cas. (CCH) Sec. 67,304 (W.D. PA 1986).

18. Georgia v Pennsylvania Railroad, 324 U.S. 439 (1945).

19. Kandell, *Supra*, page 88.

20. Constantine notes that the Federal Trade Commission's unwillingness to share documents cost Pennsylvania, \$250,000, in pursuing the suit. 21. If the Commonwealth had investigative powers, it may have been able to avert the draining of monies from both its own budget, as well as the budgets of the stores.

Even with the successful outcome of this case, the state continued to face difficulty in securing information needed to proceed with investigations of alleged anticompetitive violations. "In one example, the Attorney General's Office uncovered evidence of agreements in wholesale newspaper distribution industry to divide up distribution territories in Pennsylvania." 22.

Dividing territories represents an antitrust offense, since two or more firms, each agree to exclusively operate in one particular area, in order to reap high profits given the lack of competition. Prices of products are consequently artificial, because they are determined by the individual distributor, and not by the natural interaction of supply and demand. The Pennsylvania Antitrust Division had referred "...the matter to the United States Department of Justice, because the Commonwealth had no investigative power to require the production of documents or the testimony of witnesses". 23. The Justice Department in turn chose not to intervene in the matter, since the Pennsylvania territorial division did not substantially impact interstate commerce.

20. Constantine, Lloyd, "Current Antitrust Enforcement Initiatives By State Attorneys General", Antitrust Law Journal, Vol. 56, Issue 1, Washington, D.C., American Bar Association, (1987) page 117. Also see, State Attorneys General: Power And Responsibilities, Edited by Lynne Ross, Washington, D.C., The Bureau Of National Affairs Inc., (1990) page 239.

21. Ibid.

22. Prepared Statement of Attorney General Ernest D. Preate, Jr., Before the Senate Judiciary Committee, May 3, 1990, page 3.

23. Ibid, page 4.

In testimony before the Pennsylvania Senate Judiciary Committee on May 3, 1990, Pennsylvania Attorney General Ernie Preate cited Pennsylvania's territorial division situation as an example of his office's impotence to get at certain antitrust violation, since it lacks investigative subpoena power. During his statements which were made in support of antitrust bills, that lay before the 1989/90 Pennsylvania legislature, Preate cited a similar case that occurred in Connecticut, yet which had a different outcome. In the same year that evidence of territorial divisions was found in Pennsylvania "...Connecticut ...investigated similar evidence under its antitrust statute and ultimately obtained written assurances of voluntary compliance from five different wholesale newspaper distributors". 24. Connecticut also receive attorneys fees for the cost of its investigation, in the amount of \$65,000. Such a monetary reward represented compensation that otherwise would have been paid for through expenditure of state revenues. The purpose of the Attorney General's comments obviously were intended to draw attention to how a state statute could be effectively utilized to break up illegal activities that harmed state economies.

The reason for Attorney General's appearance was due to a renewed effort to enact a state antitrust law. A crisis erupted in the final days of December, 1989 as the cost of energy products, such as heating oil, and propane gas dramatically increased. Telephone calls and letter flooded into the Capitol Building, prompting lawmakers to rapidly consider state antitrust. Consumers concerned by the price surge provided a conducive environment for enactment. The Office of

24. Prepared Statement Of Attorney General Ernest D. Preate, Jr., Before The Senate Judiciary Committee, Considering Senate Bill 1470, May 3, 1990, page 4.

Attorney General, specifically the Antitrust Section bore a great deal of the consumer outrage. Yet, the enforcement unit was unable to effectively evaluate the fuel pricing patterns given its lack of investigative powers. The section had to admit to consumers it was limited in its ability to protect them economic abuse. The Attorney General's office did embrace the crisis as an opportunity to again advance antitrust issue.

In a State Senate Consumer Protection Committee Hearing on the fuel price increase, occurring on January 10, 1990, Attorney General Ernie Preate, a Republican, formally expressed his desire to see a state antitrust act enacted so as to protect consumers against illegality which possibly contributed to the current crisis. He stated:

"The fact of the matter is that although we are conducting a substantial investigation at this time, we will not be able to be as thorough or efficient as we would like. My Antitrust Section has often been stymied in similar investigation because of the lack of pre-complaint investigatory powers. It would be unfortunate if our present investigation suffer a similar fate." 25.

Preate concluded his remarks with statements that aired his populist intentions of protecting "our citizens". He struck a nerve among legislators, who felt they had to show their constituents the legislature's resolve to assist consumers. A month later three bills were introduced into the Pennsylvania House and Senate.

Upon the arrival of the antitrust bills into the legislature, lobbyists began their flurry of activity intent on influencing state representatives and senators.

Among the most prominent of interest groups was the Pennsylvania Chamber of

25. Prepared Statement Of Attorney General Ernest D. Preate, Jr., Before The Senate Consumer Protection And Professional Licensure Committee, Examining Fuel Oil Price Increases, January 10, 1990, page 12-13.

Business and Industry, which again commenced its efforts to persuade lawmakers to reject the bills. Well organized and well financed by the business community, the Chamber was capable to maintain constant contact with legislative staffs. Once bills entered the legislative process, the Chamber was already set to commence its lobbying efforts. Since legislators and their staffs lacked the time necessary to become experts in antitrust law, the Chamber was a powerful source of information concerning the law.

Seeking lawmakers who did not have a position on the issue was the prime occupation of the business lobby. The Chamber placed emphasis was placed upon Senators. The reason for this focus relates to comments made by a Washington antitrust lobbyist, concerning the federal antitrust process. Jonathan Cuneo, a former attorney for the FTC and counsel to the House Monopolies and Commercial Law Subcommittee, comments on the reason why Senate membership is emphasized in a lobbying effort. He states:

"On the House side, the members have fewer...committee assignments and tend to be more familiar with the details of particular proposals...and frequently have strong views on particular subjects with antitrust. On the Senate side, the members have broader jurisdictions and frequently have had less opportunity to focus on specifics." 26.

Although Cuneo was discussing the federal process, his observation also hold true for the state legislatures as well. During the 1989/90 Pennsylvania Legislative Session, the Senate's 50 members were disbursed among 21 committees, while the House's 203 members were divided among 12 committees. 27. Having to be

26. Dulmage, Claudia H., "Washington's Antitrust Lobbyists", Antitrust, American Bar Association, Summer, 1990, page 33.

27. The Pennsylvania Manual, 1989/90 Legislative Session, pages 94-95, 102-103, 205-210, 229-230.

exposed to so many issues, Senators are likely not to have adopted a personal view on the antitrust laws or attained considerable working knowledge of the issue. Also, since there are fewer Senators to lobby, it is an easier for lobbyists like the Chamber, to influence members of the Senate.

The first hearings on the antitrust issue took place before the House Judiciary Committee, considering House Bill (HB) 2376 on April 30, 1990. Judah Lescovitz, representing the Chamber of Business and Industry, was the primary speaker supporting the business community's interest in defeating the bill. His testimony hinged upon three primary areas of concern. The first was the fact that federal laws were the most effective and efficient means of prosecuting anticompetitive violators. State laws simply did not have the impact on interstate commerce that the federal enforcement agencies had. Lescovitz relied upon the interpretations of antitrust that were prominent during the Reagan years, and which reflected the Chicago School idea that only a limited number of anticompetitive violations necessitated government intervention. These were price fixing and bid-rigging. Lescovitz could have easily been Robert Bork, as he stated that by adding to the already large state bureaucracy would, "...further burden the competitiveness of local industry...". 28.

To support his argument, Lescovitz referred to the energy price surge as an example of the inability of the state to effectively evaluate that crisis. A National Association of Attorneys General (NAAG) report on the fuel crisis noted that the federal government was "best equipped" to examine the problem. 29.

28. Lescovitz, Judah, Business Chamber of Business and Industry, Testimony on H.B. 2376, April 30, 1990, page 5.

29. Ibid.

The report had been co-written by the Pennsylvania Office of Attorney General, which seemed to confirm that states could not effectively enforce state laws. Representative John Broujos (D-Carlisle), the prime sponsor of the House bill, asked Lescovitz the reasons why he believed state enforcement was not appropriate, given the decline of federal antitrust enforcement ? Lescovitz answered that it all came down to money, and the federal government simply had more of it. 30.

The Chamber's representative also asserted that by allowing the state to become active in antitrust affairs, the state's court system would further be burdened as judges would have to become more acclimated to antitrust interpretations, and cases would overwhelm already filled court dockets. It was stressed that enactment would cause unnecessary physical and financial strain on an already burdened judicial system. 31.

The second concern related to the potential abuse of antitrust power by the Attorney General in order to produce a positive consumer protection image among the electorate, that would enhance eventual re-election efforts. Lescovitz pointed to "...states like New York and California, who both possess antitrust laws and who orchestrated news conferences to announce state antitrust proceedings that never amounted to anything". 32. Such claims carried some weight giving New York Attorney General Robert Abrams high profile as a frequent state antitrust enforcer.

The final plea was for government to have a conciliatory relationship with

31. Notes of House Judiciary Committee Hearing on H.B. 2376, David Filbert, April 30, 1990, page 13.

32. Lescovitz, *Supra*, page 6.

business, what Schwartz defined as "corporate laxity". 33. Lescovitz asserted, "...that the enactment of a state antitrust law here in Pennsylvania would run counter to the economic philosophy of making Pennsylvania an attractive climate for business". 34. In a time when the state government was fiscally constrained, the legislature could ill afford losing corporations to other states as a result of excessive bureaucracy. By establishing laws that were less antagonistic toward businesses, corporate operations were likely to stay in the state. For those legislators who lacked knowledge of antitrust, this argument seemed very convincing, since no lawmaker wants to drive business away and lose much needed employment and tax revenues.

The argument in favor of state government maintaining good relation with businesses gains strength in light of a 1984 study conducted by Shughart and Tollison. The study examined the relationship between federal antitrust enforcement and national unemployment trends. By examining the impact of annual increases in federal antitrust expenditures for enforcement of the Sherman and Clayton Acts, and its subsequent impact on unemployment trends between 1947 and 1981, the two researchers found that a 1 percent increase in annual spending yielded a 0.17 percent increase in the economy's unemployment rate. 35. That translates into 7,000 jobs lost for every 1 percent of increased spending which was believed to create increased antitrust enforcement. The

32. Lescovitz, *Ibid*, page 4.

33. Schwartz, Eli, Corporate Finance, New York, St. Martin's Press, (1962) page 25.

34. Lescovitz, *Supra*, page 4.

35. Tollison, Robert, "Public Choice And Antitrust, Economic Liberties And The Judiciary, Edited by James A. Dorn and Henry G. Manne, Fairfax, VA, George Mason University Press, (1987) page 297-298.

Shughart-Tollison study does seem to lend support to the idea of practicing corporate laxity when constructing legislation. Yet, the study fails to consider how antitrust enforcement may add to employment.

In 1989, a bankrupted Eastern Airlines planned to sell all its gates at the Philadelphia International Airport to USAir. USAir already possessed a substantial number of gates, and the acquisition of Easterns gates would provide the air carrier with a dominant position in the Philadelphia market. The Pennsylvania Office of Attorney General contested the sale on the grounds that the Commonwealth's economy would be greatly injured. The basis for the action derived from a common law principle that protected the state's commerce from substantial harm caused by restraints of trade. 36. The efforts by the Attorney General were recognized by the Justice Department, which soon after initiated a grievance against the sale, which ultimately ended USAir's desire for the gates. Instead, another carrier, Midway Airlines, which was new to the market, bought the gates and provided more job opportunities for the Philadelphia region than USAir was prepared to offer. 37. This example reveals an instance where an antitrust action increased employment by adding to the number of firms operating in a market.

In order to counter the influential arguments of the Chamber, Preate and his staff assembled a wide array of participants who could best make the case for enactment. Most prominent among those to testify in support of the antitrust measures were the Attorney General of Kansas, Robert Stephan and the former

36. See note 36.

37. Shoup, Mike, "Will Midway Bring Phila. Better Fares and Service ?", The Philadelphia Inquirer, (July 16, 1989) page 3-R.

Attorney General of New Jersey Cary Edwards, each of whom had opportunities to utilize their state's antitrust law. Both were scheduled to be witnesses before the Senate Judiciary Committee considering SB 1470 with Attorney General Preate. Also included on the roster of supportive witnesses were three consumers who had been injured by various violations.

Stephan and Edwards arrived the night before the hearing to meet with representative from Preate's office in order to review the strategy of supporting the bill. During the meeting, Attorney General Stephen posited the idea, that by emphasizing antitrust's "deterrence" factor, a more palatable case could be made for the law. Since opponents had noted the abuse that could arise from an elected attorney general having such powers, a rebuttal should be made emphasizing a more benign nature to the law. The idea basically asserted that by the sheer existence of the law, the business community would be inclined not to engage in anticompetitive activity for fear of an investigation from the attorney general's office. Stephan believed in this aspect of antitrust law, and as an elected attorney general, the argument potentially could dilute the abuse argument. 38. Former Attorney General Edwards also felt that he could make that same assertion and further noted that antitrust actions undertaken by his office only involved business activity legitimately thought to be a violation. He felt that the idea of an attorney general using his powers under an antitrust law does not make sense, since he desires to maintain a diversity of firms in competition and not unduly harm the activities of the firms.

Stephan and Edwards made their assertions the next morning to the Senate Committee. Since Stephan was an elected attorney general and Edwards was an

appointed attorney general, a balanced perspective was provided to legislators, one that emphasized the fact that cases were filed not for political reasons but for legitimate reasons. What's more, both men were Republicans and naturally thought of as protective of business. By having both kinds of attorneys general, a case could be made that would refute the idea of an elected attorney general trying to use antitrust as a political tool. Maness had pointed out in his study that there was a relationship between the type of attorney general (elected or appointed) and the number of antitrust cases filed. Attorneys general who were elected tended to have a high number of cases while appointed attorneys general had a lower number of filings. Maness reasoned that since an elected officer was exposed to political pressure, he may wish to enhance his image among voters as being a protector of consumers. 39. The testimony of Stephan and Edwards provided evidence to the contrary.

Three Pennsylvania citizens, who had had personal stories of anticompetitive activity doing harm to their status as either consumers or small business owners also testified. One of these witnesses had been injured by the high fuel prices of the winter, a reminder of the crisis that commence the renewed antitrust effort. The most important testimony was provided by Preate himself.

Attorney General Preate expressed his sheer frustration that so many potential antitrust cases had to be dropped given his lack of an investigative subpoena authority. Business abuses consequently were allowed to continue in

38. I was an observer of the meeting that took place between Attorneys General Stephan and Edwards and members of the Pennsylvania Attorney General's staff. The meeting occurred on May 2, 1990.

39. Maness, *Supra*, page 857.

Pennsylvania markets, causing unknown harm to consumers and small businesses. The federal authority granting *parens patriae*, did not grant investigative powers, so the utilization of federal laws allowed a limited field in which to investigate and prosecute. 40. After a decade under New Federalism and the Reagan Administration's adoption of efficiency school ideas, states were left on their own to deal with anticompetitive activities. Pennsylvania was in many cases unable to fill the federal void.

Preate's overall approach in presenting his case was to admit that he had powers to attack antitrust violations, but that those powers were limited and incomplete. Gaps existed between the *parens patriae* authority and the state Anti-Bid Rigging Act 41., which allowed prosecutions of those who participated in collusive or combining actions to lessen competition during bidding processes for such things as state and school district contracts for goods and services. Use of the Anti-Bid Rigging Act was only available in cases that availed themselves of state or municipal contracts. All other potential violations were not covered by the statute. "It is not a bar against monopolization, mergers, tying arrangements or price discrimination." 42. "The Commonwealth...has common law authority to protect its economy under Georgia v. Pennsylvania Railroad, (1945)...however this authority only applies where the damage to the Commonwealth of Pennsylvania is so great that its economy is threatened." 43. Most antitrust violations are small in nature and fall through the federal

40. Prepared Statement Of Attorney General Ernest D. Preate, Jr., Before The Senate Judiciary Committee, May 3, 1990 page 7.

41. Ibid, page 6. Also see, 73 P.S. Sec. 1611-1620 (Pocket Supp. 1989).

42. Kandell, Supra, page 103.

43. Ibid, page 8.

enforcement gaps.

What has to have been the Attorney General's most important averment during his testimony were comments concerning the 1989, Supreme Court case California v. ARC America Corporation 44., which allowed state Illinois Brick repealers. The prior Illinois Brick case, which had disallowed indirect purchasers from filing price fixing cases under federal law, treated state indirect claim identically. The Supreme Court in the ARC case conversely chose not to treat states using state laws the same way, and recognized states' rights to possess Illinois Brick repealer laws which in turn allowed indirect purchaser to file suit. Considering that Pennsylvania can only bring antitrust suits under federal law, it was incapable of protecting purchaser, including themselves because they remained bound by Illinois Brick. The Attorney General noted, that "...as an indirect purchaser, Pennsylvania was not able to secure damages in a copper water tubing price-fixing case, where nine states recovered \$375,000 by suing in their own state courts". 45. Senate Bill 1470, which the Attorney General was defending, provided relief for indirect purchaser, via an Illinois Brick repealer.

The Chamber of Business and Industry was also present at the Senate Judiciary Committee hearing, again represented by Judah Lescovitz. Lescovitz later refuted the Attorney General's argument for indirect purchaser protection. Although he recognized the ARC ruling, he was convinced that Illinois Brick's

44. Supra, Chapter Three, note 29.

45. Prepared Statement of Attorney General Ernest D. Preate, Jr., Before The Senate Judiciary Committee, May 3, 1990, page 13.

substance should still apply to the states. Lescovitz then averred that without coordinated efforts by the several states, indirect purchaser recoveries could ultimately result in "double jeopardy" for the convicted firm, as different jurisdictions could claim harm. 46. This would ultimately cause great financial damage to the firm. An ability to sue in this way would also heighten the court's work load. The Chamber feels that the inclusion of an Illinois Brick repealer would do harm to the economic health of the state's industry, through the actions of public and private suits in Pennsylvania, together with suits possibly coming from other states, if the convicted firm operated in interstate commerce. The double jeopardy issue that Lescovitz cites, notwithstanding the ARC decision, has not been resolved by the courts.

Attorney General Preate concluded by airing observations made by Flynn and Maness, that were expressed earlier in the paper. Preate stressed Pennsylvania's precarious situation given the "...difference between the theoretical reach of federal antitrust law and federal enforcement policy" 47. This reminded committee members of an enforcement gap. This gap was believed to continuously do damage to the Commonwealth's economic well-being.

The immediate concern the state legislature had given to the antitrust issue through May of 1990, was in reaction to the energy crisis of the previous winter. Yet, by the end of May, when consumer heating oil and propane concerns were not as evident, and other problems began to consume more and more time of lawmakers. It was believed that antitrust would be voted upon before the

46. Lescovitz, Judah, Testimony on S.B. 1470, Pennsylvania Chamber of Business and Industry, May 3, 1990, page 6.

47. Prepared Statement for Attorney General Preate, May 3, 1990, Supra, page 14.

summer recess, yet the issue was losing its momentum. By June more urgent considerations, such as the state budget process and an Anti-Takeover Bill had displaced antitrust on the legislative agenda. The two major antitrust bills, HB 2376 and SB 1470, were left languishing in committee. As the summer commenced, lobbyist continued thwart passage of the bills, as a vote was believed to take place sometime in the fall, prior to the November, 1990, elections.

Attorney General Preate lobbied for the antitrust bill throughout the summer at meetings of associations made up of individuals who would gain from its enactment. At a meeting of the Philadelphia Bar Association's Antitrust Law Committee, Preate reiterated his view of the existing enforcement gap between federal and state antitrust protection continued to leave the Commonwealth open for local violations. He criticized Governor Robert Casey's silence on the issue and credited the governor's lack of support to the upcoming election. 48.

Joining the Attorney General was The Pennsylvania Trial Lawyers Association who fully embraced the Senate legislation. In a letter sent to legislators in Harrisburg, Legislative Counsel Mark Phenicie, indicated that his association, which represented 4200 licensed attorneys in every county in Pennsylvania, believed Senate Bill 1470 to be the best way to give consumers protection from abuses that can occur in unregulated markets. 49. Phenicie repeated many of the views expressed by antitrust proponents, such as how the bill tracks the

48. Brennan, Lisa, "Preate Urges Lawmakers To OK PA's First Antitrust Measure", The Legal Intelligencer, Philadelphia, Legal Communication, Ltd., July 2, 1990, page 8.

49. Letter to Senator Vincent J. Fumo, Mark E. Phenicie, Pennsylvania Trial Lawyers Association, June 12, 1990.

federal antitrust laws, and how it provides a process of bringing cases to state courts for relief of injuries. He then asserted that his organization, with its membership, was cited by opponents of the bill as the cause of inefficiencies experienced by the business community. He indicated in the letter that, "(l)egislative opponents of the Pennsylvania Trial Lawyers Association frequently and inaccurately point to us and the injured clients we represent as being the culprits for high prices brought on by exorbitant liability insurance rates". 50. Phenicie reveals a rivalry that is at the core of antitrust legislation, the rivalry between business and lawyers.

The Chamber of Business and Industry and the Trial Lawyers Association are the two most powerful lobbies in the debate over state antitrust. It makes for a veritable "clash of titans" in the halls of the State Capital. The conflict between lobbyists revolve around the interest each seek to protect for their constituencies. Private litigants are not precluded from bringing private cases to court under state law seeking to expand their avenues of possible litigation. For the view of the business community, such private suits would force firms to invest in legal defense counsel and liability insurance, thus sapping the firm of its profits and reinvestment capability. The competition between the two involves both the history of antitrust, as well as the differing philosophical interpretations that developed. Their efforts during the debate often establish the prevailing trends that guide the process. The reason for this conclusion is simple, antitrust laws invariably impact both.

Of the legislative attempts to enact an antitrust law, only the House bill was

50. Ibid.

able to survive the committee process of abundant amendments, to reach its final step, third consideration before the House of Representatives. 51. "The House proceeded to third consideration of HB 2376; entitled:

" An Act prohibiting contracts, combinations and conspiracies in restraint of trade or commerce; prohibiting monopolies and attempts to monopolize trade or commerce; prescribing powers and duties of certain State officers and agencies; providing for remedies, fines and penalties for violation of act and barring certain causes of action." 52.

With that announcement, the Broujos Antitrust Bill came before the House for final debate on amendments and approval. Discussions often pertain to specific language that is thought by some to be an integral part of the eventual law's substance. Although, none of the lobbyists are present, their influence is. The first matter considered was aspects of the Attorney General's investigative subpoena power. Representative Broujos offered language that would deter the abuse of information obtained from business and industry. The primary concern was that submitted corporate documents and papers could not be used under the state's Anti-Bid Rigging statute, or federal antitrust statutes, nor would the material be shared with other agencies or competing firms. Broujos noted that, "...at the behest of a major (unnamed) industry in Pittsburgh..." 53., the language was included to provide safeguards against abuse. Violation of the amendment would result in a misdemeanor-in-the-third-degree. 54. A close working relationship exists between lawmakers and the business community,

51. Pennsylvania Legislative Journal, September 26, 1990, page 1006

52. Ibid.

53. Ibid, page 1607.

54. Ibid.

since maintaining a stable economy remains the most vital aspect of state government. If industry is weighed down by government intrusion the chances of relocation exists. Corporate laxity is very apparent in state politics. The previously mentioned amendment passed 193-0.

The political debate that brings issues before a legislative body often include rhetoric that emphasizes the importance of an issue to the polity. Popular sentiment is stroked in order to gain the acceptance of the electorate, and their legislators. Yet, once an issue or measure enters the legislature, expressions of popular sentiment no longer are utilized, and the practical application crafting law takes over. The debate shifts and begins to consider legislative exemptions and the inclusion of specific language which might constrain a previously high minded idea, in order to provide protection to businesses. Within the legislative process, a balance must be struck between the consumer-citizens and the producer-employers. Such a balance is important Without a balance, the vitality of the state's economy becomes uncertain.

Lawmakers rise to oppose the bill, claiming that it is unnecessary, given the protection and antitrust expertise provided by federal laws and enforcement agencies. Representative Terrence McVerry (R.-Lebanon) indicated that if the bill were enacted, its exemptions should match those contained in the federal statute, specifically including an exemption for the insurance industry. 55. Others join McVerry in a call to establish exemption for insurance as well as other industries, those that are regulated by other state laws and agencies. The purpose was to avoid an overbearing government constraining the operations of

55. Ibid, page 1615.

and services regulated by the Public Utilities Commission (PUC) such as electric and telephone services. The establishment of such amendments was representative of an idea, utilized by the advocates of antitrust themselves, the idea of limited centralized power. During the legislative debates, discourse involves a mixture of interpretations of this concept. Antitrust advocates seek to ensure that limitations on the economic power of business exist, while defenders of business strive to establish negative restraints on excessive government authority. Realizing that the interests of the state's business community and the citizens are interlaced, the predominant position taken by House lawmakers was one gravitating towards the middle, where mutual interests are served. Based upon the voting record of House members this is what happened during the debate over HB 2376. Members passed several exemptions for businesses, and in the end passed the bill by a vote of 182 to 11. By doing so the House signaled its desire to see greater protection be provided to consumers, while at the same time, recognizing through guidelines the need to protect business interest. Comanor in his article entitled, "Antitrust in a Political Environment", has stated, "At the very least, the political arena provides both a vehicle for appeal and an avenue for compromise". 56. That avenue was provided in the Pennsylvania House. Upon its approval, the measure was reported to the Senate.

The Senate treated its antitrust bill with great disregard. After being reported in and out of the Judiciary Committee, due to irreconcilable language concerning the powers of the Attorney General and various exemptions for the businesses, including insurance companies, the bill was tabled on November 20,

56. Comanor, *Supra*, page 751.

1990. Senate membership never considered the House bill, primarily due to a lack of time, as the 1989/90 Legislative Session ended on January 1, 1991 and the House bill was terminated. The legislative process for antitrust enactment would have to begin all over again. The Senate's refusal to enact their bill certainly involved the influence of the Chamber of Business and Industry, together with the Pennsylvania Insurance Federation. This influence, combined with the fact that 1990, was an election year provided too many negatives for serious consideration of antitrust legislation in the fall. Self-interest, so often pointed to as a reason for both those for and against antitrust, provided the basis for the Senate's inaction.

The rapid pace of the enactment process in the House, during the first months of the 1991/92 Legislative Session, was due to the fact that an antitrust bill had already gone through the legislative "pipeline". It had triumphed over opposing political forces and was overwhelmingly accepted by House members. The thesis, thus far has established that the politics of antitrust is determined by the self-interest of the participants in the debate. Knowing that assertion, House members have determined antitrust to be in both the public welfare as well as their own.

Yet, the House did not have to experience the pervasive influence of the business lobbyists as the Senate had to endure. Although party politics plays little direct influence in a Senator's determination on the antitrust matters, the fact that the Senate is controlled by Republicans cannot be ignored. Traditionally, Republicans have been the party that supports the business community's interests. This fact however does not diminish the notion that

voting occurs on a purely self-interest basis. One only has to look to the House, to see that a substantial number of Republican voted for the House bill.

Therefore to understand the situation in the Senate, one has to consider the already existing desire among Senators to support business, combined with the presence and influence of business interest groups, provide for an unsuitable environment for antitrust enactment. The business lobby only needs one branch of the legislature to defeat any antitrust measure. It has that control over the Pennsylvania Senate.

Whether or not the Senate's current inactivity on the antitrust matter was due to the House's approval of an antitrust measure cannot be known. The passage of House Bill 191, certainly provided greater impetus for enactment, since the approval came early in a legislative session. The prompt timing would seemingly provide enough time for the deliberative process of negotiations to unfold. Enactment seemed quite possible, since time would not be working against antitrust efforts. Yet, the Senate did become inactive after the House vote, as noted earlier in the Introduction of this thesis. This might have been due to other issues gaining the attention of Senators. But given certain irreconcilable differences over language contained in the Senate bill, particularly a proposed clause allowing the state to regulate passenger airlines from monopolizing airports, prompted heightened efforts by lobbyists to thwart any discussion on enactment. Since the Senate and approved House bills currently sit idle in committee, provides evidence that their efforts have succeeded.

CONCLUSION

The competition between the two antitrust ideologies is not unlike the competition that takes place within the economic markets, antitrust laws strive to protect. Both are inextricably connected to the notion of discourse and debate, and differ only to the extent that one focuses upon policy, while the other emphasizes price. Each of their forms of competition inevitably achieve a balance or equilibrium, that keeps the process within which they operate in a relative state of harmony. The defining feature in both situations is self-interest.

Whether political or economic in nature, self-interest is a rational occupation, in which the participants of the antitrust debate seek to maximize benefits both to the economy and to their political standing among the consumer and corporate electorate, while minimizing possible harm. 1. Defining what constituency should be favored depends a great deal upon the political and economic situations a polity faces at particular times. As the Pennsylvania case demonstrated, debate taking place during an election year provides little opportunity for the enactment of antitrust law. Too much harm can fall upon an individual legislator. A vote one way may lose the consumer vote, while voting another way may harm the procurement of campaign finances that are provided by corporate citizens. The politics of antitrust cannot be defined in terms of simple political party affiliation, since every lawmaker has an unique interpretation of the polity's interest, as well as, his or her own. Legislators

1. Sullivan, E.T., *Supra*, pages 8-9.

hail from differing areas of a state, each calling for different concerns.

Fulfilling each concern is impossible.

The early originators of antitrust law found that the uncertainty brought about by the industrial revolution called for government intervention to minimize the possible negative effects on consumers, as well as small businesses. At that time economic values and political liberties were identified together. Defending one meant defending the other. Independent action and free choice were highly prized ideals. Today, however, that close affiliation no longer exists. Economics has become the primary concern of many state legislatures, due to its importance in maintaining the well-being of the polity, by providing employment, tax revenues, and charitable donations. States seek to make the environment comfortable for corporations. Corporate laxity is a real phenomenon, one that in the case of Pennsylvania may even extend to stifling enactment of antitrust laws. Although economists and attorneys today understand more about the behavior of commercial markets and the effects they have on consumers, uncertainty still exists relative to how governmental intervention through antitrust enforcement may impact the business community and indirectly the polity as a whole. Caution and inaction are often the courses taken by legislatures and government officials who determine the enactment and enforcement of antitrust law.

This thesis paper has revealed an activist state antitrust trend in the nation. By virtue of Congressional action and Executive philosophy, as well as Supreme Court decisions, states have the capability of enacting state laws to protect their markets from anticompetitive activities that restrain trade and commerce.

Utilization of those laws depends primarily upon the economic and political circumstance of the day. Political pragmatism is the primary cornerstone in their application and use. The unique case of Pennsylvania exemplifies this point. The current inaction by the Pennsylvania legislature, specifically the Senate, in not enacting an antitrust measure is primarily due to an unwillingness to harm businesses, especially when they are faced with larger economic problems. In February, 1992, the Pennsylvania Department of Labor and Industry announced that the state lost 133,000 non-farm jobs in January alone. 2. This figure certainly reflects the recession the state as well as the nation is currently in. Enactment of and the subsequent enforcement of an antitrust law, might unduly burden a firm, thus forcing it to relocate to a new venue, and in the process take jobs with it. The predominate view of the legislature would be that the common good was not served by such an action. Consequently, it is unlikely that the Senate will consider the antitrust matter during the remainder of this legislative session.

A second reason for continued inaction in this matter is political in nature and relates to the fact that 1992 is an election year, in which an incumbent attorney general will run for re-election. Some lawmakers, heeding arguments of the Chamber of Business and Industry, do not wish to see the attorney general gain legal power, which can be turned into political capital, by filing cases in favor of consumers. Protecting the business community from abuse of too much power remains the Senate's goal.

2. Stranahan, Susan Q, "The Fewest PA. Jobs On Record", The Philadelphia Inquirer, (March 1, 1992) page B-1.

On its surface, the debate over antitrust laws seems to be based upon two absolutes, for or against their utilization. But in the final analysis, given the inclusion of a variety of competing interests, the process that leads to equilibrium is more complex and less clear. A great deal is left in way the government reacts to the economic circumstances it faces. Only when a crisis faces government, will it enact legislation or initiate policy to ameliorate the problem. In regard to the situation in Pennsylvania, relative to antitrust, the fuel crisis of 1989, which started the current antitrust effort, was not enough to warrant the adoption of an antitrust law. Participants were not willing to set aside their own interests, in favor of creating a law thought to better protect the state's economic markets. Until a crisis, involving anticompetitive behavior develops that endangers enough of the consumer-electorate, antitrust will remain in stasis.

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APPENDIX A

STATE ANTITRUST LAWS BY DATE OF PASSAGE (Enactments Prior To And Immediately After Passage Of The Sherman Act)

STATE	DATE
Maryland	1867
Tennessee	1870
Arkansas	1874
Texas	1876
Georgia	1877
Indiana	1889
Iowa	1889
Kansas*	1889
Maine	1889
Michigan	1889
Missouri	1889
Montana	1889
Nebraska	1889
North Carolina	1889
North Dakota	1889
South Dakota	1889
Washington	1889
Kentucky	1890
Louisiana	1890
Mississippi	1890
Alabama	1891
Illinois	1891
Minnesota	1891
California	1893
New York	1897

ENACTMENT OF STATE LAWS (1900-1929)

Connecticut, Florida, Massachusetts, New Hampshire,
Ohio, South Carolina, Vermont, Virginia, Wisconsin.

*Kansas was the first state to pass a formal antitrust statute. States prior to 1889, included language within their constitution deploring restraints of trade and commerce.

Appendix A was taken from an article written by George Stigler, entitled, "The Origins of the Sherman Act". Stigler's article was included in E. Thomas Sullivan's compilation of writings, The Political Economy Of The Sherman Act. The original printing of the Stigler article was in 1985, in 14 Journal of Legal Studies 1, printed by the University of Chicago Press.

APPENDIX B

DEFINING THE PRIMARY FEDERAL ANTITRUST LAWS

Sherman Antitrust Act, 15 U.S.C.A. 1-7, (1890).

"Prohibits any unreasonable interference by contract or combination, or conspiracy with the ordinary usual free competitive pricing or distribution system of the open market in interstate trade."

Clayton Act, 15 U.S.C.A. 12-27, (1914).

"Prohibits price discrimination, tying and exclusive dealing contracts, mergers and interlocking directorates, where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

Robinson-Patman Act, 15 U.S.C.A. 13, (1936).

"Prohibits any seller engaged in commerce to directly or indirectly discriminate in the price charged purchasers on the sale of commodities of like grade and quality where the effect may be to injure, destroy or prevent competition with any person who grants or knowingly receives a discrimination or the customer of either."

Taken from Black's Law Dictionary, Fifth Edition, West Publishing Co., (1979).

APPENDIX C

ENACTMENT OF STATE ANTITRUST LAWS POST HART- SCOTT-RODINO ACT OF 1976

<u>STATE</u>	<u>DATE</u>
Iowa	1976
Kentucky	1976
South Dakota	1977
Massachusetts	1978
West Virginia	1978
New Mexico	1979
Rhode Island	1979
Utah	1979
Delaware	1980
Florida	1980
District of Columbia	1981
Minnesota	1981
Texas	1983
Michigan	1984

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VITA

David A. Filbert, the son of Dr. and Mrs. Augustus M. Filbert, was born and raised in Corning, New York. Upon graduating from Lebanon Valley College in 1987, he began working in the practical world of political science. His first position was a staff assistant with United States Representative Amory Houghton Jr. of the 34th Congressional District of New York. After receiving a paralegal degree from Widener University, he moved to Harrisburg, Pennsylvania. During the next two years he was employed as a legal assistant with the law firm of Duane, Morris & Heckscher, the United States Bankruptcy Court for the Middle District of Pennsylvania and the Pennsylvania Office of Attorney General. It was his work with the Attorney General's Antitrust Section that provided him with the interest to write this thesis. In 1990, he entered Lehigh University as a student seeking a Master's Degree in Government and to commence his academic career. Although having written a political column for his undergraduate school's newspaper, The Quad, this thesis represents his first substantial written work. He lives in Beverly, New Jersey with his wife Marliese.

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OF
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